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Thirty-first session
New York, 1 - 12 June 1998

PROVISIONAL AGENDA, ANNOTATIONS THERETO AND SCHEDULING OF MEETINGS OF THE THIRTY-FIRST SESSION

Note by the Secretariat

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II. ANNOTATIONS TO THE PROVISIONAL AGENDA

Item 1. Opening of the session

The thirty-first session will be held at the United Nations Headquarters, New York, from 1 to 12 June 1998. The session will be opened on Monday, 1 June 1998, at 10:30 a.m. The Commission is composed of the following member States: Algeria, Argentina (alternates with Uruguay annually starting in 1998), Australia, Austria, Botswana, Brazil, Bulgaria, Burkina Faso, Cameroon, Colombia, China, Egypt, Fiji, Finland, France, Germany, Honduras, Hungary, India, Iran (Islamic Republic of), Italy, Japan, Kenya, Lithuania, Mexico, Nigeria, Paraguay, Romania, Russian Federation, Singapore, Spain, Sudan, Thailand, Uganda, United Kingdom of Great Britain and Northern Ireland, United States of America, and Uruguay (alternates with Argentina annually starting in 1999). In addition, States not members of tne Commission, as well as invited international organizations, may attend as observers and participate in the deliberations.

Item 2. Election of officers

Pursuant to a decision taken by the Commission at its first session, the Commission elects, for each session, a Chairman, three Vice-Chairmen and a Rapporteur.

Item 3. Adoption of the agenda

It is suggested that all items be considered in plenary.

Item 4. Privately financed infrastructure projects

At its twenty-ninth session, in 1996, the Commission decided to prepare a legislative guide on build-operate-transfer (BOT) and related types of privately-financed infrastructure projects (A/51/17, paras. 225-230). In such projects, the Government engages a private entity to develop, maintain and operate an infrastructure facility in exchange for the right to charge a price, either to the public or to the Government, for the use of the facility or the services or goods it generates. The legislative guide to be prepared is intended to assist national authorities and legislative bodies wishing to establish a favourable legal framework for promoting infrastructure development through private investment. The advice provided in the guide will aim to achieve an appropriate balance between the need to facilitate private participation in infrastructure projects and the need to foster the interests of the host Government and the public.

At its thirtieth session, in 1997, the Commission, on the basis of the report A/CN.9/438 and its addenda 1 to 3, exchanged views on the nature of the issues to be discussed in the draft legislative guide and possible methods for addressing them and considered a number of specific suggestions (A/52/17, paras. 231-246). The Commission generally approved the line of work proposed by the Secretariat.

At the current session, the Commission will have before it a document setting out the proposed structure of the legislative guide (A/CN.9/444); a draft of the introduction to the legislative guide,"Introduction and background information on privately financed infrastructure projects" (A/CN.9/444/Add.1); and drafts of chapter I, "General legislative considerations" (A/CN.9/444/Add.2), chapter II, "Sector structure and regulation" (A/CN.9/444/Add.3), chapter III, "Selection of the concessionaire" (A/CN.9/444/Add.4) and chapter IV, "Conclusion and general terms of the project agreement" (A/CN.9/444/Add.5).

It is suggested that the Commission devote the first five days of the session (1 to 5 June) to an in-depth consideration of the draft chapters prepared so far, in particular the proposed structure of the legislative guide, the concept of the draft chapters, whether they cover the relevant issues, whether statements made adequately cover the practical needs of privately financed infrastructure projects and whether the advice given is appropriate. The Commission may also wish to consider, where appropriate, the desirability of formulating legislative recommendations in the form of sample provisions for the purpose of illustrating possible legislative solutions. In addition, the Commission may wish to discuss the future procedure to be followed in the preparation of the legislative guide, including the question whether the review of the remaining draft chapters of the guide should be entrusted to a Working Group.

Item 5. Electronic commerce

At its thirtieth session (1997), the Commission endorsed the conclusions reached by the Working Group on Electronic Commerce at its thirty-first session. With respect to the issue of incorporation by reference, the Working Group was of the opinion that the issue should be dealt with at its thirty-second session (A/CN.9/437, para. 155). As to the desirability and feasibility of preparing uniform rules on issues of digital signatures and certification authorities, and possibly on related matters, the Working Group had recalled that, alongside digital signatures and certification authorities, future work in the area of electronic commerce might also need to address: issues of technical alternatives to public-key cryptography; general issues of functions performed by third-party service providers; and electronic contracting (A/CN.9/437, paras. 156-157). The Commission entrusted the Working Group with the preparation of uniform rules on the legal issues of digital signatures and certification authorities. With respect to the exact scope and form of such uniform rules, it was generally agreed that no decision could be made at this early stage of the process. It was felt that, while the Working Group might appropriately focus its attention on the issues of digital signatures in view of the apparently predominant role played by public-key cryptography in the emerging electronic-commerce practice, the uniform rules to be prepared should be consistent with the media-neutral approach taken in the UNCITRAL Model Law on Electronic Commerce. Thus, the uniform rules should not discourage the use of other authentication techniques. Moreover, in dealing with public-key cryptography, those uniform rules might need to accommodate various levels of security and to recognize the various legal effects and levels of liability corresponding to the various types of services being provided in the context of digital signatures. With respect to certification authorities, while the value of market-driven standards was recognized by the Commission, it was widely felt that the Working Group might appropriately envisage the establishment of a minimum set of standards to be met by certification authorities, particularly where cross-border certification was sought.

The Working Group began the preparation of uniform rules for electronic signatures at its thirty-second session. The Commission will have before it the report of the Working Group on the work of that session (A/CN.9/446). With respect to incorporation by reference, the Working Group adopted the text of a draft provision, decided that it should be presented to the Commission for review and possible insertion as a new article 5bis of the UNCITRAL Model Law on Electronic Commerce and requested the Secretariat to prepare an explanatory note to be added to the Guide to Enactment of the Model Law (A/CN.9/446, para. 24). The Commission will have before it a note prepared by the Secretariat pursuant to that request (A/CN.9/450). Prior discussion of the issue of incorporation by reference may be found in documents A/CN.9/WG.IV/WP.71, paras. 77-93, WP. 74 and A/CN.9/446, paras. 14-24.

Item 6. Receivables financing: assignment of receivables

The Commission, at its twenty-eighth session (1995), decided that work on a uniform law on assignment in receivables financing should be undertaken (A/50/17, paras. 374-381). The Working Group on International Contract Practices continued its work at its twenty-seventh and twenty-eighth sessions, which were held respectively from 20 to 31 October 1997 at Vienna and from 2 to 13 March 1997 in New York, by reviewing revised articles of a draft Convention on Assignment in Receivables Financing prepared by the Secretariat (documents A/CN.9/WG.II/WP.93 and A/CN.9/WG.II/WP.96). The Commission will have before it the reports of the Working Group (A/CN.9/445 and A/CN.9/447).

Item 7. Monitoring implementation of 1958 New York Convention

The Commission, at its twenty-eighth session in 1995, approved the project, undertaken jointly with Committee D of the International Bar Association, aimed at monitoring the legislative implementation of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) (reports: A/50/17, paras. 401-404; A/51/17, paras. 238-243, and A/52/17, paras. 257-259). Stressing that the purpose of the project was not to monitor individual court decisions applying the Convention, the Commission called upon the States Parties to the Convention to send to the Secretariat the laws dealing with the recognition and enforcement of foreign arbitral awards. In November 1995, the Secretariat sent to the States Parties a questionnaire relating to the legal regime governing the recognition and enforcement of foreign awards, prepared in cooperation with Committee D of the International Bar Association. Subsequent to that date, the Secretariat has repeated its request to the States Parties for the relevant information. As of 18 March 1998, the Secretariat has received 52 replies to the questionnaire. The Secretariat intends to present orally a progress report to the Commission.

Item 8. Case law on UNCITRAL texts (CLOUT)

Based on a decision by the Commission at its twenty-first session, in 1988 (A/43/17, paras. 98-109), the Secretariat established a system for collecting, and disseminating information on, court decisions and arbitral awards relating to normative texts emanating from the work of the Commission. The system relies on National Correspondents designated by the States having become parties to an UNCITRAL Convention or having enacted legislation based on an UNCITRAL Model Law. Out of the 93 such States, 55 have designated National Correspondents. The features of that

system are explained in the User Guide (A/CN.9/SER.C/GUIDE/1). Abstracts of court decisions relating to the United Nations Sales Convention, the Hamburg Rules and the UNCITRAL Model Arbitration Law are contained in documents A/CN.9/SER.C/ABSTRACTS/1 to 16. A thesaurus of the Sales Convention and an index of cases applying the Sales Convention are contained in documents A/CN.9/SER.C/INDEX/1 and A/CN.9/SER.C/INDEX/2/REV.1, respectively.

Item 9. Training and technical assistance

The Commission will have before it a note by the Secretariat on this subject (A/CN.9/448).

Item 10. Status and promotion of UNCITRAL legal texts

The Commission will have before it a note by the Secretariat (A/CN.9/449) concerning the present status of the Convention on the Limitation Period in the International Sale of Goods (New York, 1974); United Nations Convention on the Carriage of Goods by Sea, 1978 (Hamburg); United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980); Convention on the Limitation Period in the International Sale of Goods, concluded at New York on 14 June 1974, as amended by the Protocol of 11 April 1980; United Nations Convention on International Bills of Exchange and International Promissory Notes (New York, 1988); United Nations Convention on the Liability of Operators of Transport Terminals in International Trade (Vienna, 1991); United Nations Convention on Independent Guarantees and Stand-by Letters of Credit (New York, 1995); Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958); UNCITRAL Model Law on International Commercial Arbitration, UNCITRAL Model Law on International Credit Transfers, UNCITRAL Model Law on Procurement of Goods, Construction and Services, UNCITRAL Model Law on Electronic Commerce and UNCITRAL Model Law on Cross-Border Insolvency.

Item 11. General Assembly resolutions on the work of the Commission

The Commission may wish to take note of General Assembly resolutions A/RES/52/157 of 15 December 1997 on the report of the United Nations Commission on International Trade Law on the work of its thirtieth session and A/RES/52/158 of 15 December 1997 on the UNCITRAL Model Law on Cross-Border Insolvency. Copies of the resolutions and the report of the Sixth Committee (A/52/649) will be made available at the session.

Item 12. New York Convention Day and Uniform Commercial Law Information Colloquium (UCLIC)

As pointed out at the 30th session of the Commission (A/52/17, para. 259), the fortieth anniversary of the 1958 New York Convention will be celebrated in the context of the Commission's thirty-first session at a special commemorative meeting on Wednesday, 10 June 1998. The programme of that meeting entitled "New York Convention Day" is set forth in the annex.

On the following day, Thursday, 11 June 1998, an additional colloquium will be held on current as well as possible future topics of work in the areas of electronic commerce, project and receivables

financing as well as cross-border insolvency. The programme of that colloquium, entitled "Uniform Commercial Law Information Colloquium (UCLIC)", is also set forth in the annex, together with an announcement of both events. Governments are invited to provide for the widest possible distribution of the annex to interested persons.

Item 13. Co-ordination and co-operation

Representatives of other international organizations will be given an opportunity to apprise the Commission of their current activities and possible means of strengthening co-operation. For example, an observer of the Comité Maritime International (CMI) is expected to inform the Commission about the preparations within the CMI for collecting information on current issues and problems in the field of transport law.

Item 14. Other business

The Commission will have before it a bibliography of recent writings related to the work of the Commission (A/CN.9/452) and a Guide to Enactment of the UNCITRAL Model Law on Cross-Border Insolvency (A/CN.9/442).

The Secretariat will present an oral report on the Fifth Annual Willem C. Vis International Commercial Arbitration Moot competition.

Item 15. Date and place of future meetings

(a) Thirty-second session

The thirty-second session will be held at Vienna. Arrangements have been made for the session to be held from 17 May to 4 June 1999.

(b) Sessions of Working Groups

(i) Working Group on Electronic Commerce

The thirty-third session of the Working Group will be held at New York from 29 June to 10 July 1998 and the thirty-fourth session will be held at Vienna from 8 to 19 February 1999.

(ii) Working Group on International Contract Practices

The twenty-ninth session of the Working Group will be held at Vienna from 5 to 16 October 1998 and the thirtieth session will be held at New York from 1 to 12 March 1999.

(iii) Working Group on Privately Financed Infrastructure Projects

The twenty-second session of the Working Group (formerly on Insolvency Law) could be held at New York from 18 to 29 January 1999, if the Commission were to entrust the review of future draft chapters of the legislative guide to a Working Group (see above, item 4).

Item 16. Adoption of the report of the Commission

The General Assembly, in paragraph 10 of resolution 2205 (XXI), decided that the Commission should submit an annual report to the General Assembly, and that the report should be submitted simultaneously to the United Nations Conference on Trade and Development for comments. Under a decision of the Sixth Committee (A/7408, para. 3), the report of the Commission is introduced to the General Assembly by the Chairman of the Commission or by another officer of the Bureau designated by the Chairman.

III. SCHEDULING OF MEETINGS

There will be 7 working days available for consideration of the agenda items at the session and two days devoted to special events. The Secretariat would recommend that the agenda items be taken up in numerical order and that the Commission anticipate devoting the first five days, i.e. Monday, 1 June, to Friday, 5 June, (after items 1 to 3) to agenda item 4. Items 5 to 11 and 13 to 15 would then be considered on Monday, 8 June, and Tuesday, 9 June. Wednesday, 10 June, is "New York Convention Day", and on Thursday, 11 June, the "Uniform Commercial Law Information Colloquium (UCLIC)" will be held. Friday, 12 June, will be reserved for the adoption of the report.

Meeting hours will be from 10.00 to 13.00 and 15.00 to 18.00, except on Monday, 1 June, when the meeting will commence at 10.30.

IV. NO MEETING OF NATIONAL CORRESPONDENTS

Since the twenty-second session of the Commission it has become customary to hold, in conjunction with Commission sessions, meetings of the National Correspondents for the case collection system referred to under agenda item 8. However, no such meeting will be held this year, because of the special colloquium planned for 11 June (see above, item 12).

ANNEX

This annex contains the announcement as well as the final programme of two special events taking place within the framework of the Commission's thirty-first session:

NEW YORK CONVENTION DAY
Wednesday, 10 June 1998

and

UNIFORM COMMERCIAL LAW INFORMATION COLLOQUIUM (UCLIC)
Thursday, 11 June 1998

Governments are invited to bring these two events to the attention of interested persons by circulating the attached materials.

UNITED NATIONS **NATIONS UNIES**

The United Nations Commission on International Trade Law (UNCITRAL)
invites participation in

NEW YORK CONVENTION DAY
(Wednesday, 10 June 1998)

and

UNIFORM COMMERCIAL LAW INFORMATION COLLOQUIUM (UCLIC)
(Thursday, 11 June 1998)

at United Nations Headquarters, New York (Trusteeship Council Chamber)

New York Convention Day is a special commemorative event on the fortieth anniversary of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, concluded at New York on 10 June 1958 and currently adhered to by 116 States.

After an opening address by the Secretary-General of the United Nations, delegates of the 1958 United Nations Conference and other leading arbitration experts will share their unique experience and views on the working of the Convention during its first forty years and its likely operation during the next forty years. As shown in the attached programme, compact information will be provided on the value and effect of the Convention, on topical issues relating to the enforceability of arbitration agreements and arbitral decisions, on the application and implementation of the Convention as well as on possible means of further improvement.

The **Uniform Commercial Law Information Colloquium (UCLIC)** is designed to provide compact information on current and possible future work items in the areas of electronic commerce, project and receivables financing as well as cross-border insolvency. As shown in the attached programme, leading experts will present their insights and assessments of topical issues.

While participation is free of charge, persons interested in either or both events need to obtain admission in advance, by sending their request to:

UNCITRAL Secretariat
Vienna International Centre (E-0455)
P. O. Box 500; A-1400 Vienna, Austria
Fax: 43-1-21345-5813
E-mail: nmikrut@unov.un.or.at

The request should contain the name of each person wishing to attend, the address (including e-mail or fax), the affiliation, and the preferred language of documentation (i. e. Arabic, Chinese, English, French, Russian or Spanish). It should also indicate whether participation is intended in the commemorative programme/cocktail reception hosted by the Association of the Bar of the City of New York and the American Arbitration Association on the evening of 10 June. Upon confirmation of their admission, participants will be sent a note with logistical details.

NEW YORK CONVENTION DAY

10 JUNE 1998

United Nations Headquarters, New York

(Trusteeship Council Chamber)

Session 1:	**The Birth: Forty years ago** Chairperson: Chairman of UNCITRAL
10.00 - 10.05 am	*Introduction*
10.05 - 10.20 am	*Opening address commemorating the successful conclusion of the 1958 United Nations Conference on International Commercial Arbitration:* Kofi Annan Secretary-General, United Nations
10.20 - 10.30 am	*The making of the Convention:* Pieter Sanders Delegate at 1958 Conference, Honorary President, International Council for Commercial Arbitration
10.30 - 10.40 am	*From New York (1958) to Geneva (1961) - a veteran's diary:* Ottoarndt Glossner Delegate at 1958 Conference, Honorary President, German Institution for Arbitration
Session 2:	**The Value: three assessments** Chairperson: Tang Houzhi Vice-Chairman, China International Economic and Trade Arbitration Commiss
10.40 - 10.45 am	*Introduction*
10.45 - 10.55 am	*Philosophy and objectives of the Convention:* Robert Briner Chairman, International Court of Arbitration, International Chamber of Commerce
10.55 - 11.05 am	*The Convention's contribution to the globalisation of international commercial arbitration:* Fali Nariman President, International Council for Commercial Arbitration

11.05 - 11.15 am	*Benefits of membership:* Ambassador Emilio Cárdenas Executive Director HSBC Roberts S.A. de Inversiones, Buenos Aires
11.15 - 11.45 am	Break
Session 3:	**The Effect: Enforceability of arbitration agreements and arbitral decisions** Chairperson: Haya Sheika Al Khalifa Attorney, Bahrain
11.45 - 11.50 am	*Introduction*
11.50 - 12.00 am	*New developments on written form:* Neil Kaplan Chairman, Hong Kong International Arbitration Centre
12.00 - 12.10 pm	*Non-signing parties to the arbitration agreement:* Jean-Louis Delvolvé Attorney, Paris
12.10 - 12.20 pm	*Provisional and conservatory measures:* V. V. Veeder Attorney, London
12.20 - 12.30 pm	*Court assistance with interim measures:* Sergei Lebedev President, Maritime Arbitration Commission; Professor, Moscow
12.30 - 12.40 pm	*Awards set aside at place of arbitration:* Jan Paulsson Attorney, Paris; Vice President, LCIA
12.40 - 1.00 pm	*Open floor*
1.00 - 3.00 pm	Lunch break
Session 4:	**The Bench: Judicial application of the Convention** Chairperson: Howard Holtzmann Honorary Chairman of the Board and of the International Arbitration Committee, American Arbitration Association
3.00 - 3.05 pm	*Introduction*

3.05 - 3.50 pm	*Judges share views concerning applying the Convention:* J. Aboul-Enein, Constitutional Court, Egypt J. Michael Goldie, Court of Appeal of B.C., Canada J. Jon Newman, Circuit Judge and former Chief Judge for the U.S. Circuit Court of Appeals for the Second Circuit (New York) J. Supradit Hutasingh, former Justice, Supreme Court, Thailand J. Keba Mbaye, former Chief Justice, Supreme Court, Senegal J. Ana Piaggi, Commercial Court, Argentina J. Andrew Rogers, former Judge of Supreme Court N.S.W., Australia
3.50 - 4.15 pm	*Open floor*
4.15 - 4.45 pm	Break
Session 5:	**<u>The Future: What needs to be done</u>** Chairperson: Muchadeyi Masunda Executive Director, Commercial Arbitration Centre in Harare, Zimbabwe
4.45 - 4.50 pm	*Introduction*
4.50 - 5.00 pm	*Improving the implementation - a progress report on the joint UNCITRAL/IBA project:* Gerold Herrmann Secretary, UNCITRAL
5.00 - 5.10 pm	*Enhancing dissemination of information, technical assistance and training:* José María Abascal Zamora Professor and Attorney, Mexico City
5.10 - 5.20 pm	*Striving for uniform interpretation:* Albert Jan van den Berg Professor, Rotterdam; Attorney, Amsterdam
5.20 - 5.30 pm	*Considering the advisability of preparing an additional Convention, complementary to the New York Convention:* Werner Melis Chairman, Presiding Council International Arbitration Court, Austrian Economic Chamber
5.30 - 5.40 pm	*Possible issues for an annex to the UNCITRAL Model Law:* Gavan Griffith Attorney, former Solicitor-General, Australia
5.40 - 6.00 pm	*Open floor*
(7.00 - 9.00 pm	Commemorative programme on enforcement of awards, and cocktail reception by Association of the Bar of the City of New York and American Arbitration Association)

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UNIFORM COMMERCIAL LAW INFORMATION COLLOQUIUM

11 JUNE 1998

United Nations Headquarters, New York

(Trusteeship Council Chamber)

Session 1:	***Topical messages from Cyberspace*** Chairperson: Chairman of UNCITRAL
10.00 - 10.05 am	*Introduction*
10.05 - 10.15 am	*The UNCITRAL Model Law on Electronic Commerce - a Landmark in Cyberspace:* Renaud Sorieul Senior Legal Officer, UNCITRAL Secretariat
10.15 - 10.25 am	*Dispute settlement in Cyberspace:* Michael E. Schneider Attorney, Geneva
10.25 - 10.35 am	*Issues of jurisdiction and conflicts of laws in Cyberspace:* Gabrielle Kaufmann-Kohler Attorney and Professor, Geneva
10.35 - 10.45 am	*Contracting in Cyberspace:* Raymond T. Nimmer Reporter on UCC Article 2B, National Conference of Commissioners on Uniform State Laws; Professor, Houston
10.45 - 10.55 am	*Possible future work by UNCITRAL:* George Thomson Deputy Minister of Justice, Canada
10.55 - 11.15 am	Open floor
11.15 - 11.45 am	Break
Session 2:	***Project and receivables financing*** Chairperson: Harold S. Burman Department of State, United States

11.45 - 11.50 am *Introduction*

11.50 - 12.00 am *UNCITRAL's draft Legislative Guide for Privately Financed Infrastructure Projects:*
José Angelo Estrella Faria
Legal Officer, UNCITRAL Secretariat

12.00 - 12.10 pm *Performance Securities in Privately Financed Infrastructure Projects:*
Carlos Gustavo Krieger
Former President, Arbitration and Advisory Committee, Panamerican Surety Association (PASA); Vice-President, Guarantees Committee, International Credit Insurance Association (ICIA)

12.10 - 12.20 pm Open floor

12.20 - 12.30 pm *UNCITRAL's draft Convention on Assignment in Receivables Financing:*
Spiros V. Bazinas
Legal Officer, UNCITRAL Secretariat

12.30 - 12.40 pm *Cross-border securitisation:*
Steven L. Schwarcz
Professor, Durham

12.40 - 12.50 pm *Good old factoring in the 21st century:*
John P. Figliozzi
Senior Vice President, Heller International, Chicago

12.50 - 1.00 pm Open floor

1.00 - 3.00 pm Lunch break

Session 3: ***Cross-border insolvency law: current issues***
Chairperson: Manuel Olivencia Ruiz
Professor, Sevilla

3.00 - 3.05 pm Introduction

UNCITRAL Model Law on Cross-Border Insolvency: salient features and benefits

3.05 - 3.15 pm *UNCITRAL Model Law on Cross-Border Insolvency in a nutshell:*
Jernej Sekolec
Senior Legal Officer, UNCITRAL Secretariat

3.15 - 3.30 pm *First legislative considerations towards enactment of the Model Law in the United States and Eritrea:*
Jay Westbrook
Professor, Austin

Peter Winship
Professor, Dallas

3.30 - 3.40 pm — *The UNCITRAL Model Law and the European Union Convention on Insolvency*:
Rafael Illescas Ortiz
Professor, Madrid

3.40 - 3.50 pm — *Cross-border insolvency law in economies in transition:*
Mario Thurner
Institute of Central and Eastern European Business Law, Vienna

3.50 - 4.05 pm — *Judges evaluating the Model Law:*
Burton Lifland
Judge, United States Bankruptcy Court

Ana Piaggi
Judge, Commercial Court, Buenos Aires

4.05 - 4.15 pm — *An insolvency administrator operating under the aegis of the Model Law*:
Neil Cooper
Chartered Certified Accountant, London

4.15 - 4.30 pm — Open floor

4.30 - 5.00 pm — Break

Current work of international organizations

5.00 - 5.10 pm — *Cross-border insolvency of banks (INSOL and the Group of Thirty)*:
Richard Gitlin
Attorney, Hartford

5.10 - 5.20 pm — *Cross-border insolvency of banks (The Group of Ten):*
Ernest Patrikis
Vice President, Federal Reserve Bank, New York

5.20 - 5.35 pm — *IBA Committee J's work towards a model for substantive insolvency law; experience with the IBA Cross-Border Insolvency Concordat:*
Richard Broude
Attorney, New York

Daniel Glosband
Attorney, Boston

5.35 - 5.50 pm — *A look into the future*:
Carl Felsenfeld
Professor, New York

Open floor

5.50- 6.00 pm — *Closing remarks*:
Hans Corell
Under-Secretary-General, The Legal Counsel of the United Nations

(7.30 - 10.00 pm — Foundation dinner of Commercial Law Association; further information will be provided with the letter of admission)

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UNITED NATIONS COMMISSION
ON INTERNATIONAL TRADE LAW
Thirty-first session
New York, 1-12 June 1998

PRIVATELY FINANCED INFRASTRUCTURE PROJECTS

Draft chapters of a legislative guide on privately financed infrastructure projects

Report of the Secretary-General

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INTRODUCTION

1. At its twenty-ninth session, in 1996, the Commission decided to prepare a legislative guide on build-operate-transfer (BOT) and related types of projects.1/ The Commission reached that decision after recommendations by many States and consideration of a report prepared by the Secretary-General (A/CN.9/424) which contained information on work then being undertaken by other organizations in that field, as well as an outline of issues covered by relevant national laws. The Commission considered that it would be useful to provide legislative guidance to States preparing or modernizing legislation relevant to those projects. The Commission requested the Secretariat to review issues suitable for being dealt with in a legislative guide and to prepare draft materials for consideration by the Commission.

2. At its thirtieth session, in 1997, the Commission had before it a table of contents setting out the topics proposed to be covered by the legislative guide, which were followed by annotations concerning the issues suggested to be discussed therein (A/CN.9/438). The Commission further had before it initial drafts of chapter I, "Scope, purpose and terminology of the *Guide*" (A/CN.9/438/Add.1), chapter II, "Parties and phases of privately financed infrastructure projects" (A/CN.9/438/Add.2) and chapter V, "Preparatory measures" (A/CN.9/438/Add.3). It was pointed out that the annotated table of contents contained in document A/CN.9/438 had been prepared by the Secretariat for the purpose of enabling the Commission to make an informed decision on the proposed structure of the draft legislative guide and its contents.

3. The Commission noted the proposal that the draft legislative guide should consider which aspects of the issues mentioned in document A/CN.9/438 should be dealt with in legislation, and which aspects should be left to be addressed by the parties in the agreements concerning the implementation of the project. It was generally felt that the documents submitted by the Secretariat presented a good basis for the work of the Commission in that field.

4. The Commission exchanged views on the nature of the issues to be discussed in the draft legislative guide and possible methods for addressing them and considered a number of specific suggestions (see A/52/17, paras. 231-246). The Commission generally approved the line of work proposed by the Secretariat, as contained in documents A/CN.9/438 and Add.1-3. The Commission requested the Secretariat to seek the assistance of outside experts, as required, in the preparation of future chapters. The Commission invited Governments to identify experts who could be of assistance to the Secretariat in that task.

5. The Secretariat has revised the documents considered by the Commission at its thirtieth session and has prepared initial drafts of additional chapters with the assistance of outside experts and in consultation with other international organizations. For the purpose of distinguishing the

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1/ Official Records of the General Assembly, Fifty-first Session, Supplement No. 17 (A/51/17), paras. 225-230.

advice provided by the legislative guide from the background discussion contained therein, it is proposed that each substantive chapter be preceded by the legislative recommendations pertaining to the matters dealt with in the chapter. Drafts of the introduction and of chapters I, II, III and IV are contained in documents A/CN.9/444/Add.1-5. Initial drafts of chapters V-XI are currently being prepared by the Secretariat for consideration by the Commission at its thirty-second session, in 1999.

I. PROPOSED STRUCTURE AND CONTENTS OF THE LEGISLATIVE GUIDE

"Introduction and background information on privately financed infrastructure projects"

6. At its thirtieth session, the Commission considered an initial draft of chapter I, "Scope, purpose and terminology of the *Guide*"(A/CN.9/438/Add.1), which was intended to provide information on the projects covered by, and on the purpose of, the legislative guide, as well as an explanation of terms frequently used therein. The Commission further considered an initial draft of chapter II, "Parties and phases of privately financed infrastructure projects" (A/CN.9/438/Add.2), which contained general background information on the concept of project finance, the parties to a privately financed infrastructure project and the phases of their implementation.

7. In the consultations subsequently conducted by the Secretariat with outside experts and international organizations, it was suggested that the usefulness of the legislative guide would be enhanced by establishing a clearer distinction between those introductory portions and the remaining chapters of the legislative guide, which are intended to contain substantive discussion and legislative advice. For that purpose, the Secretariat has combined the former draft chapters I and II into one single introduction, which takes into account, as appropriate, the suggestions made at the thirtieth session of the Commission in respect of documents A/CN.9/438/Add. 1 and 2 (see A/52/17, paras. 238-243).

8. A draft of the introduction is contained in document A/CN.9/444/Add.1.

Chapter I, "General legislative considerations"

9. In the opening section of chapter I (previously numbered chapter III) it is proposed to discuss two issues concerning the general legal framework for privately financed infrastructure projects, namely, the legislative authorization for the host Government to undertake such projects and the legal regime to which they are subject. The second section of chapter II would consider the possible impact of other areas of legislation on the successful implementation of those projects. The concluding section of chapter II would discuss the possible relevance of international agreements entered into by the host country for domestic legislation governing privately financed infrastructure projects. An initial outline of issues proposed to be covered in chapter I was contained in document A/CN.9/438, paragraphs 6 to 16.

10. At the thirtieth session of the Commission, it was suggested that chapter II should elaborate on the different legal regimes governing the infrastructure in question, as well as on the services provided by the project company, issues in which there were significant differences among legal systems. It was further suggested that attention should be given to constitutional issues relating to privately financed infrastructure projects (see A/52/17, para. 237(a)).

11. A draft of chapter I, which reflects the above suggestions, is contained in document A/CN.9/444/Add.2. It also includes some of the contents of former chapter V, "Preparatory measures" (A/CN.9/438/Add.3).

Chapter II, "Sector structure and regulation"

12. At the thirtieth session of the Commission, it was noted that issues pertaining to privately financed infrastructure projects involved also issues of market structure and market regulation and that consideration of those issues was important for the treatment of a number of individual topics proposed to be covered by the legislative guide. For instance, issues of sector structure (such as the level of competition the host Government wishes to promote in the sector concerned) would affect a governmental decision as to whether to grant exclusivity to one concessionaire or whether to award multiple concessions. Similarly, issues of sector regulation (such as the possible role of a regulatory agency in establishing the quality of services provided by the project company and the prices of those services) would be crucial for establishing an appropriate regulatory mechanism (see A/52/17, para. 235).

13. In order to deal with issues of competition, sector structure and regulation at the level of detail envisaged by the Commission, the Secretariat proposes the addition of a separate chapter. A draft of this chapter is contained in document A/CN.9/444/Add.3.

Chapter III, "Selection of the concessionaire"

14. Chapter III (previously numbered chapter IV) is intended to deal with methods and procedures recommended to be used for the award of privately financed infrastructure projects. An initial outline of issues proposed to be covered in chapter IV was contained in paragraphs 17 to 26 of document A/CN.9/438.

15. At the thirtieth session of the Commission, it was suggested that chapter IV should emphasize that the appropriateness of the selection procedure depended not only on the nature of each individual project, but also on the policy pursued by the Government for the sector concerned. It was also suggested that the legislative guide should discuss issues raised by unsolicited proposals (see A/52/17, para. 237(b)).

16. A draft of chapter III is contained in document A/CN/9/444/Add.4.

Chapter IV, "Conclusion and general terms of the project agreement"

17. In the opening section of chapter IV (previously numbered chapter VI), it is proposed to deal with general considerations concerning the project agreement, discussing in particular the different approaches taken by national legislation concerning the project agreement (from those that scarcely refer to the project agreement to those that contain extensive mandatory provisions concerning clauses to be included in the agreement). The remaining sections would deal with rights and obligations of the project company that, in addition to being dealt with in the project agreement, might be usefully addressed in the legislation, as they might affect the interests of third parties. An initial outline of issues proposed to be covered in chapter IV was contained in paragraphs 29 to 38 of document A/CN.9/438.

18. A draft of chapter IV is contained in document A/CN.9/444/Add.5. It also includes some of the contents of former chapter V, "Preparatory measures" (A/CN.9/438/Add.3).

Chapter V, "Government support"

19. The opening section of chapter V (previously numbered chapter VII) is intended to discuss support measures, incentives and facilities that may be offered by the host Government for the purpose of enhancing the commercial viability of a project, ensuring its technical feasibility or reducing the political or other risks faced by investors and lenders. An initial outline of issues proposed to be discussed in this chapter was contained in paragraphs 39 to 45 of document A/CN.9/438.

20. At the thirtieth session of the Commission, it was suggested that chapter V should discuss possible manners in which privately financed infrastructure projects could be facilitated with a minimum involvement of governmental guarantees. With regard to forms of governmental support to infrastructure projects, it was suggested that the legislative guide should give attention to specific forms of governmental support, such as facilitation of entry visas and work permits; waiver of immigration or repatriation restrictions for foreign personnel; waiver of currency exchange restrictions (see A/52/17, para. 237(d)).

Chapter VI, "Construction phase"

21. Chapter VI (previously numbered chapter VIII) is intended to discuss issues that arise during the construction of infrastructure facilities, such as the relations between the host Government, the project company and the construction contractors, procedures for monitoring the progress of the construction works and for final inspection and approval of the infrastructure. An initial outline of issues proposed to be discussed in this chapter was contained in paragraphs 46 to 54 of document A/CN.9/438.

Chapter VII, "Operational phase"

22. It is proposed to consider in chapter VII (previously numbered chapter IX) the main issues relating to the conditions of operation of the infrastructure, such as: the scope and quality of the services provided by the project company; the establishment and adjustment of the price charged by the project company; the relations of the project company with the purchasers of the goods or services or the users of the infrastructure; procedures for monitoring the performance of the project company. This chapter is intended to supplement, on a more practical level, the general analysis of regulatory issues provided in chapter II. An initial outline of issues proposed to be discussed in this chapter was contained in paragraphs 55 to 66 of document A/CN.9/438.

Chapter VIII, "Delays, defects and other failures to perform"

23. In the opening section of chapter VIII (previously numbered chapter X), it is proposed to deal with the possible consequences of, and remedies for, default by the project company, during both the construction and the operation of the infrastructure. Another section of chapter VIII would consider possible approaches for dealing with events that might preclude the project company, temporarily or permanently, from performing its contractual obligations. The closing section of the chapter would deal with unforeseen events and changes of circumstances, including changes that are brought about by subsequent acts of the host Government. An initial outline of issues proposed to be discussed in this chapter was contained in paragraphs 67 to 73 of document A/CN.9/438.

24. At the thirtieth session of the Commission, it was suggested that this chapter should consider the desirability and appropriateness of dealing with issues relating to delays, defects and failures to perform in legislation specific to privately financed infrastructure projects (see A/52/17, para. 237(e)).

Chapter IX, "Duration, extension and early termination of the project agreement"

25. It is suggested to discuss in chapter IX (previously numbered chapter XI) the consequences of the expiry of the concession period, the possibility of an extension of the project agreement, and the events or circumstances that may cause or justify its early termination. An initial outline of issues proposed to be discussed in this chapter was contained in paragraphs 74 to 83 of document A/CN.9/438.

26. At the thirtieth session of the Commission, it was suggested that this chapter should give particular attention to questions such as ownership of infrastructure and related property; responsibility for residual liabilities of the project company; terms of transfer of the infrastructure to the host Government in BOT projects. In addition to that, it was suggested that attention should be given to cases where the host Government might decide to keep the infrastructure permanently under private operation (see A/52/17, para. 237(f)).

Chapter X, "Governing law"

27. Chapter X (previously numbered chapter XII) is intended to deal with the issue of the law applicable to privately financed infrastructure projects and the possible implications of different laws applying to different aspects of the project. An initial outline of issues proposed to be discussed in this chapter was contained in paragraphs 84 to 87 of document A/CN.9/438.

28. At the thirtieth session of the Commission, it was suggested that this chapter should elaborate on the possibility and the limitations of choice-of-law clauses, taking into account the specific nature of the various contractual arrangements involved, emphasizing the role of choice-of-law clauses in the contracts between the project company and its suppliers and other contractors. It was also suggested to further consider the desirability for the parties to make use of commercial law rules elaborated by international bodies (see A/52/17, para. 237(g)).

Chapter XI, "Settlement of disputes"

29. Chapter XI (previously numbered chapter XIII) is intended to deal with the legislative framework for the settlement of disputes that might arise in connection with privately financed infrastructure projects. An initial outline of issues proposed to be discussed in this chapter was contained in paragraphs 88 to 92 of document A/CN.9/438.

30. At the thirtieth session of the Commission, it was suggested that this chapter should elaborate on the possibility and the limitations of arbitration agreements, taking into account the specific nature of the various contractual arrangements involved.

CONCLUSIONS

31. The Commission may wish to note that the proposed time-table for the Commission's session, as set out in the provisional agenda (A/CN.9/443), provides that the first five days of the session would be devoted to a discussion of the subject of privately financed infrastructure projects. It is suggested that the Commission use this period for an in-depth discussion of the draft legislative guide. The Commission may wish to consider the proposed structure of the legislative guide, as set out above in paragraphs 6 to 30 and take up the introduction and chapters I to IV (addenda 1 to 5 to the present report). The Commission may wish to consider the concept of the draft chapters, whether they cover the relevant issues, whether statements made adequately cover the practical needs of privately financed infrastructure projects and whether the advice given is appropriate. The Commission may wish to consider, where appropriate, the desirability of formulating the legislative recommendations in the form of sample provisions for the purpose of illustrating possible legislative solutions for the issues dealt with in the legislative guide, as was suggested at its thirtieth session (see A/52/17, para. 235).

32. On the basis of its discussion of the draft chapters and of the schedule of meetings of the Commission and its Working Groups during the remainder of 1998 and in 1999, the Commission may further wish to consider the future procedure that should be followed in the preparation of the legislative guide.

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PRIVATELY FINANCED INFRASTRUCTURE PROJECTS

Draft chapters of a legislative guide on privately financed infrastructure projects

Report of the Secretary-General

Addendum

INTRODUCTION AND BACKGROUND INFORMATION ON PRIVATELY FINANCED INFRASTRUCTURE PROJECTS

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A. Introduction

1. Purpose and scope of the *Guide*

1. The purpose of the *Guide* is to assist national authorities and legislative bodies wishing to establish a favourable legal framework for promoting infrastructure development through private investment. The advice provided in the *Guide* aims to achieve an appropriate balance between the need to facilitate private participation in infrastructure projects and the need to foster the interests of the host Government and the public. In addition to legislative and policy-making bodies, the *Guide* may be of interest to other authorities, at the national or local level, involved in the execution of privately financed infrastructure projects.

2. The *Guide* is intended to be used as a reference in the preparation of new laws or in the review of the adequacy of existing laws and regulations. For that purpose, the *Guide* discusses a number of issues often addressed in national laws and regulations pertaining to infrastructure projects. The *Guide* considers the desirability of dealing with those issues in legislation and, where appropriate, offers recommendations for the formulation of possible legislative solutions. The *Guide* does not provide a single set of model solutions, but it helps the reader to evaluate different approaches available and to choose the one most suitable in the national or local context.

3. While the *Guide* is primarily concerned with legislative issues, some of its chapters (e.g. chapter IV, "Conclusion and general terms of the project agreement") discuss selected issues that arise under the agreements executed by the parties to a privately financed infrastructure project. Where such a discussion is offered, its focus is on matters that might be usefully addressed in the legislation, in addition to being dealt with in the relevant agreements. The *Guide* is not intended to provide advice on drafting agreements for the execution of privately financed infrastructure projects or on contractual solutions for problems that arise under such agreements.

4. The *Guide* is concerned with projects in which private entities participate in the financing, construction, maintenance or operation of certain types of public infrastructure in exchange for the right to charge a price, either to the public or to a State entity, for the use of the infrastructure or for the services it generates. The *Guide* gives special attention to infrastructure projects that involve an obligation, on the part of the selected entity, to undertake physical construction, repair, or expansion works in the infrastructure concerned prior to its operation. Some chapters deal specifically with issues that arise in connection with that obligation (e.g. chapter VI, "Construction phase"). However, a number of chapters discuss issues that may well arise in projects where the private operator takes over an existing infrastructure or where such infrastructure is permanently owned by the private operator (e.g. chapter I, "General legislative considerations"; chapter IV, "Conclusion and general terms of the project agreement"; and chapter VII, "Operational phase").

5. Projects in which a private operator takes over an existing public infrastructure are sometimes grouped together with other transactions for the "privatization" of State functions or property. However, the *Guide* does not cover "privatization" transactions that do not relate to

infrastructure development and operation. A number of reasons justify this limitation of the scope of the *Guide*. "Privatization" transactions may be carried out for various reasons, depending on the activity or property being "privatized". In many cases, they are carried out for the purpose of obtaining revenue for the Government or to free the Government of economic activities that can be more efficiently carried out by the private sector. This is typically the case in the sale of State-owned land and other real estate property, but may also be the motivation for the sale of shares in State-owned companies. In the particular case of infrastructure projects, however, the main purposes are typically to expand the availability of needed infrastructure and to improve the management and operation of existing infrastructure.

6. Furthermore, the infrastructure projects discussed in this *Guide* involve the establishment of a lasting bundle of rights and obligations between the infrastructure operator and the Government, through a project agreement or sector-specific regulations. In turn, the activities of most privatized companies other than public utilities would not be subject to special regulation; for example, upon transfer to the private sector, a steel corporation or a privatized automobile plant previously owned by the Government would in most cases operate in essentially the same manner as competing companies in the same market.

7. It should be further noted that the *Guide* does not cover projects for the exploitation of natural resources. This limitation, too, is due to a number of reasons. For historic or strategic grounds, many countries have established a special ownership regime for natural resources or other particular categories of goods and property. Common examples may include water sources, minerals, oil, natural gas and other substances found in the subsoil. In some countries they may extend to forests, beaches, the territorial waters or the continental shelf. Many countries have a well established tradition of granting private persons and entities the right to exploit economically those natural resources under some "concession", "licence" or "permission" issued by the State. The mechanisms for awarding concessions for the exploitation of natural resources are in most cases different from those commonly used for selecting a company to carry out an infrastructure project. By the same token, the function of a concessionaire of natural resources, as a commodity producer, is quite distinct from the position of a project company in a privately financed infrastructure project. While infrastructure facilities are destined to be used by the public or to generate public services, mines and other natural resources are not intended for public use and in most cases are exploited by the concessionaire in its own private interest. Furthermore, unlike public services that are provided under some form of regulatory oversight by the State, the minerals or other materials extracted or processed by the concessionaire usually become its own property and are in most cases sold freely on the market. Lastly, the concessionaire of an infrastructure facility is typically under an obligation to ensure its permanent operability, whereas at the end of a mining concession the mineral deposits are returned to the State with their substance diminished or even exhausted.

2. Terminology used in the *Guide* */

8. The following paragraphs explain the meaning and use of certain expressions that appear frequently in the *Guide* or which are often used in national laws in connection with infrastructure projects. For terms not mentioned below, such as terms of art used in financial and business management writings, the reader is advised to consult other sources of information on this subject, such as the *Guidelines on Infrastructure Development through Build-Operate-Transfer (BOT) Projects* prepared by the United Nations Industrial Development Organization (UNIDO). 1/

(a) "Infrastructure projects"

9. In the context of this *Guide*, the term "infrastructure projects" is used to refer specifically to the development and operation of physical facilities, equipment or systems used to generate public services for purposes of economic production or personal or household use. Examples of infrastructure projects within that meaning may be found in various sectors, and include various types of facilities, equipment or systems: power generation plants and power distribution networks (electricity sector); systems for local and long-distance telephone communications and data transmission networks (telecommunications sector); waste water treatment plants, water distribution facilities (water sector); facilities and equipment for waste collection and disposal (sanitation sector); physical installations and systems used for public transportation, such as urban and interurban railways, underground trains, bus lines, roads, bridges, tunnels, ports, airlines, airports (transportation sector).

10. Infrastructure projects do not always require the construction or operation of large physical facilities. Indeed, in some cases (e.g. cellular telephony) the main element of the project may consist of services obtained from others (e.g. owners of communications equipment) rather than of construction works.

(b) "Public services" and "public utilities"

11. Infrastructure projects typically entail the provision of services or commodities to the public (or to an intermediary who distributes them to the public) or the operation or maintenance of a facility open to public use. These activities are often referred to under national law as "public services" and, according to the legal tradition of the country concerned, their providers may be referred to with different expressions, such as "public utilities", "public services enterprises" or "public service providers". It should be noted, however, that those expressions are not uniformly understood and may encompass different activities in different legal systems.

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*/ *[N.B.: This section may be expanded so as to cover other terms that might appear in future chapters and might require prior explanation.]*

1/ United Nations Industrial Development Organization, *Guidelines for Infrastructure Development through Build-Operate-Transfer (BOT) Projects*, Vienna, 1996. (UNIDO Sales Publication No. UNIDO.95.6.E) (hereafter referred to as the *"UNIDO BOT Guidelines"*).

While infrastructure projects as defined above would, under most legal systems, involve some form of "public service", this expression may also be used in connection with a number of other activities not covered by the *Guide*.

12. The notions of "public utilities" and "public services" are well established in the legal tradition of some countries, being sometimes the subject of constitutional law or detailed statutory provisions. In some countries the provision of public services may be governed by a specific body of law, which is typically referred to as "administrative law" (see chapter I, "General legislative considerations", paras. 12-15). However, such a high degree of specificity is not present in all legal systems. In a number of countries, aside from being subject to special regulations, public utilities are not regarded as being intrinsically distinct from other types of business.

13. As used in this *Guide*, the expression "public services" refers to services provided in connection with public infrastructure or as a result of its operation. The expressions "public utilities" and "public service providers" refer to the legal entities responsible for the management of infrastructure facilities or systems that supply those public services. In this *Guide* the expressions should not be understood in the technical meaning that may be attached to them under any particular legal system.

(c) "Concession"

14. In many countries, public services constitute State monopolies or are otherwise subject to special regulation by Government. Where that is the case, the provision of a public service by a private entity typically requires an act of authorization by the appropriate State body. Different expressions are used to define such acts of authorization under national laws, and in some legal systems different expressions may be used to denote different types of authorizations. Commonly used expressions include terms such as "concession", "franchise" or "licence". In some national laws, particularly those belonging to the civil law tradition, certain forms of infrastructure projects are referred to by well-defined legal concepts such as "public works concession" or "public service concession".

15. The *Guide* uses the word "concession" to refer generally to the right given to the project company or consortium to construct and operate or only to operate the public infrastructure facility and to charge for its use or for the services it generates. As used in the *Guide*, the word "concession" is not to be understood in a technical meaning that may be attached to it under any particular legal system or national laws.

(d) "Build-operate-transfer (BOT)" and related expressions

16. A number of acronyms are sometimes used to refer to various types of privately financed infrastructure projects, according to the type of private participation or the ownership of the relevant infrastructure.

17. An infrastructure project is said to be a "build-operate-transfer" (BOT) project when the host Government selects a private entity to finance and construct an infrastructure facility or system and gives the entity the right to operate it commercially for a certain period, at the end of which the infrastructure and the right to its operation is transferred to the Government. In those projects, the host Government usually holds title to the facility and the land on which it is built throughout the life of the project. The expression "build-transfer-operate" (BTO) is sometimes used to emphasize that the infrastructure facility becomes the property of the host Government immediately upon its completion, the project company being awarded the right to operate the facility for a certain period. One variation of BOT or BTO projects are the "build-rent-operate-transfer" (BROT) projects or "build-lease-operate-transfer" (BLOT) projects, where, in addition to the obligations and other terms usual to BOT projects, the private entity rents the physical assets on which the facility is located for the duration of the agreement.

18. "Build-own-operate-transfer" (BOOT) are projects in which a private entity is engaged for the financing, construction, operation and maintenance of a given infrastructure facility in exchange for the right to collect fees and other charges from its users. In contrast to BOT projects, under this arrangement the private entity owns the facility and its assets until it is transferred to the host Government. However, the parties may provide that the private entity will own the facility permanently and is not under an obligation to transfer them back to the host Government in which case the project is referred to as a "build-own-operate" (BOO) project.

19. Besides acronyms used to highlight the particular ownership regime, other acronyms may be used to emphasize one or more of the obligations of the project company. In some projects, existing infrastructure facilities are turned over to private entities to be modernized or refurbished, operated and maintained, permanently or for a given period of time. Depending on whether the private sector will own such an infrastructure facility, those arrangements are called either "refurbish-operate-transfer" (ROT) or "modernize-operate-transfer"(MOT), in the first case; or "refurbish-own-operate" (ROO) or "modernize-own-operate"(MOO) in the latter case. The expression "design-build-finance-operate" (DBFO) is sometimes used to emphasize the private sector's additional responsibility for designing the facility and financing its construction.

20. Sometimes all of the above transactions and other possible forms of infrastructure projects are generally referred to with the acronym "BOT". In the *Guide*, however, the term "BOT" is only used in reference to the particular type of infrastructure projects described in paragraph 16.

(e) "Project agreement", "project consortium", "project company"

21. As used in the *Guide*, the words "project agreement" mean an agreement between the host Government and the private entity or entities selected by the host Government to carry out the project, and which sets forth the terms and conditions for the construction or modernization, operation and maintenance of the infrastructure. Other expressions which may be used in some legal systems to refer to such an agreement, e.g. "concession agreement" or "concession contract", are not used in the *Guide*.

22. The expression "project consortium" refers to the group of companies that submit a joint proposal for the development of an infrastructure project and agree to carry it out jointly if awarded the project by the host Government.

23. The words "project company" are used to refer to the independent legal entity especially established by the project consortium for the purpose of carrying out the construction works and operating the infrastructure facility.

24. When in the context of the *Guide* particular reference is made to the fact that the project consortium or the project company has been granted a concession (i. e. the right to construct or operate the infrastructure facility as defined above in para. 15), the expression "concessionaire" may be used for such a project consortium or project company. Furthermore, the word "concessionaire" is sometimes used in the *Guide* to refer, generally, to entities which operate public infrastructure pursuant to a concession by the host Government.

(f) References to national authorities

25. The expression "host Government" is generally used in the *Guide* to refer to the authority that has the overall responsibility for the project and on behalf of which the project is awarded. Such authority may be national, provincial or local.

26. The expression "regulatory body" is used in the *Guide* to refer to the governmental organ or entity that is entrusted with the authority to issue rules and regulations governing the operation of the infrastructure. The regulatory body may be established by statute with the specific purpose of regulating the sector in which the infrastructure operates.

27. The term "awarding authority" is used in the *Guide* to refer to the organ, agency or office within the host Government which is responsible for selecting the concessionaire. Depending on the system of the host country, more than one organ, agency or office may be involved in the selection process and related procedures leading to the award of the project.

(g) "Procurement" and "selection procedures"

28. The word "procurement" is generally used in the *Guide* to refer to the systematized acquisition by the Government, on a commercial basis, of the items or services it needs in order to perform its functions or fulfil its objectives. The body of those rules is usually known as "procurement law". The word "procurement" usually denotes a purchasing activity and this narrow connotation may be inappropriate to refer to the award of privately financed infrastructure projects. For clarity purposes, the *Guide* uses the words "selection procedures" to refer to the procedures used by the Government to award the right to construct and operate an infrastructure project.

(h) Turnkey contract; design-build contract

29. The *Guide* uses the term "turnkey contract" to refer to a construction contract whereby a contractor or consortium of contractors is engaged to perform all obligations needed for the completion of the entire works, i.e. the transfer of the technology, the supply of equipment and materials, the installation of the equipment and the performance of the other construction obligations (such as civil engineering and building).2/ In a turnkey contract, the contractor is normally obliged to undertake all necessary works so that the purchaser receives a facility which is ready for being put to operation. A contract is said to be "design-build and turnkey" when the construction organization also assumes the responsibility for the design of the infrastructure.

B. Background information on infrastructure projects

30. The following sections discuss basic issues of privately financed infrastructure projects, such as private sector participation in public infrastructure and the concept of project finance. They further identify the main parties involved in those projects and their respective interests, and briefly describe the evolution of a privately financed infrastructure project. These sections are conceived as general background information on matters that are examined from a legislative perspective in the subsequent chapters of the *Guide*. For additional information, the reader is particularly advised to consult publications by other international organizations, such as the United Nations Industrial Development Organization (UNIDO),3/ the World Bank 4/ or the International Finance Corporation 5/.

1. Private sector and public infrastructure

31. The roles of the public and the private sectors in the development of infrastructure have evolved considerably in history. Public services such as gas street lighting, power distribution, telegraphy and telephony, steam railways, electrical tramways were launched in the nineteenth century and in many countries they were provided by private companies that had obtained a licence or concession from the Government. Numerous privately-funded road or canal projects

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2/ The notion of turnkey contract is discussed in the *UNCITRAL Legal Guide on Drawing Up International Contracts for the Construction of Industrial Works*, New York, 1988, United Nations Publication, Sales No. E.87.V.10 (hereafter referred to as the "*UNCITRAL Construction Legal Guide*"), p. 16.

3/ *UNIDO BOT Guidelines* (see footnote 1).

4/ International Bank for Reconstruction and Development, *World Development Report 1994 - Infrastructure for Development*, Washington, D.C., 1994; *World Development Report 1996 - From Plan to Market*, Washington, D.C., 1996.

5/ International Finance Corporation, *Financing Private Infrastructure*, Washington, D.C., 1996.

were carried at that time, and there was a rapid development of international project financing, including international bond offerings to finance railways or other major infrastructure.

32. However, during most part of the twentieth century the international trend was, in turn, toward public provision of infrastructure and other services. Infrastructure operators were often nationalized and competition was reduced by mergers and acquisitions. The degree of openness of the world economy also receded during this period. Infrastructure sectors remained privately operated only in a relatively small number of countries, often with little or no competition. In many countries the pre-eminence of the public sector on infrastructure service provision became enshrined in the constitution (see chapter I, "General legislative considerations", paras. 1-4).

33. The current reverse trend toward private sector participation and competition in infrastructure sectors started in the early 1980s and it has been driven by general as well as country-specific factors. Among the general factors are significant technological innovations; high indebtedness and stringent budget constraints limiting the public sector's ability to meet increasing infrastructure needs; deepening of international and local capital markets improving the access to private funding; as well as an increasing number of successful international experiences with private participation and competition in infrastructure.

34. Various projects for the development of new infrastructure have been carried out by private entities in recent years. In addition to that, many countries have launched extensive privatization programmes transferring public utility companies to private operators. In many countries, new legislation was adopted, not only to govern these transactions, but also to modify the market structure and competition rules governing the sectors in which they were taking place (see chapter II, "Sector structure and regulation", ___).

2. Forms of private sector participation

35. Recent developments show that private sector participation in infrastructure projects may be devised in a variety of different forms, ranging from publicly-owned and operated infrastructure to fully privatized projects. The paragraphs below discuss the following three main variants: (a) public ownership and operation; (b) public ownership and private operation; and (c) private ownership and operation. The appropriateness of a particular variant for a given type of infrastructure is a matter to be considered by the Government in view of the national needs for infrastructure development and an assessment of the most efficient ways in which particular types of infrastructure may be developed and operated. In a particular sector more than one option may be used.6/

6/ For a more detailed discussion of these forms, see International Bank for Reconstruction and Development, *World Development Report 1994 - Infrastructure for Development*, p. 8-9.

(a) Public ownership and operation

36. The traditional modality of infrastructure provision offered limited or no scope for private sector participation, with the Government being both the owner and the operator of the infrastructure. However, some countries have devised mechanisms for attracting direct private financing or for facilitating the operation of public infrastructure under commercial principles.

37. A way of achieving those results may be for the Government to establish a separate legal entity, such as a joint stock company, controlled by the Government but managed as an independent private commercial enterprise that is subject to the same rules and business principles that apply to private companies. Some countries have a well established tradition in operating national infrastructure through these types of companies. Opening the capital of such companies to private investment, or making use of such a company's ability to issue bonds or other security may create an opportunity for attracting private investment in infrastructure. Some of these companies have been used as "special purpose vehicle" for raising private funds for infrastructure investment through the project finance modality.

38. Another form of involving private participation in publicly owned and operated infrastructure may be the negotiation of "services contracts" whereby the public operator contracts out specific operations and maintenance activities to the private sector. The host Government may also entrust a broad range of operation and maintenance activities to a private entity acting on behalf of the relevant public authority. Under this arrangement, which is sometimes referred to as a "management contract", the private operator's compensation may be linked to its performance, often through a profit-sharing mechanism, although compensations on the basis of a fixed fee may also be used, particularly where the parties find it difficult to establish mutually acceptable mechanisms to assess the operator's performance.

(b) Public ownership and private operation

39. There are various ways in which the whole operation of public infrastructure may be transferred to private entities. One possibility is to give the private entity, usually for a certain period, the right to use a given infrastructure, to supply the relevant services and to collect the revenue generated by that activity. Such infrastructure may already be in existence, or may have been especially built by the private entity concerned, such as in a typical "build-operate-transfer" (BOT) project (see above, para. 18). This combination of public ownership and private operation has the essential features of arrangements which in some legal systems may be referred to as "public works concessions" or "public services concessions" (see chapter I, "General legislative considerations", para.12).

40. Another form of private participation in infrastructure is where a private entity is selected by the host Government to operate a facility which has been built by or on behalf of the host Government, or whose construction has been financed with public funds. Under such an arrangement, the operator assumes the obligation to operate and maintain the infrastructure and is granted the right to charge for the services it provides. In such a case, the operator assumes the obligation to pay to the Government a portion of the revenue generated by the infrastructure

which is used by the Government to amortize the construction cost. These arrangements are referred to in some legal systems as "lease" or *"affermage"*.

41. The nature of the private entity's rights in the equipment and assets related to the infrastructure, as well as the regime under which such infrastructure is operated (whether pursuant to a contract or to a unilateral "licence"), may vary greatly between different legal systems (see further chapter I, "General legislative considerations", paras. 12-15). In a number of countries some types of publicly owned infrastructure are rarely taken over by the Government at the end of the concession period since the Government usually prefers to maintain that infrastructure under private operation. In these cases, the private use and possession of public assets, which was originally awarded for a definite period, may, in practice, become indefinite (see further chapter IX, "Duration, extension and early termination of the project agreement", ___).

(c) Private ownership and operation

42. The third basic modality entails that the private entity not only operates the infrastructure, but also owns the assets related to it. Here, too, there may be substantial differences in the treatment of those projects under national laws, for instance as to whether the Government retains the right to reclaim title to the infrastructure or to assume the responsibility for its operation (see also chapter I, "General legislative considerations", paras. 16-19).

43. Where the infrastructure is operated pursuant to a governmental licence, private ownership of physical assets (e.g. telecommunication network) is often separable from the licence to provide the service to the public (e.g. long-distance telephone services), in that the licence can be withdrawn by the Government under certain circumstances. Thus, private ownership of the infrastructure may not necessarily entail an indefinite right to provide the service.

3. Financing infrastructure projects

44. Alternatives to traditional public financing are playing an increasing role in the development of infrastructure. In recent years, new infrastructure investment in various countries included projects with exclusively or predominantly private funding sources. The two main types of funds are debt finance, usually in the form of loans obtained at commercial markets, and equity investment. However, financing sources are not limited to those. Public and private investment have often been combined in arrangements sometimes called "public-private partnerships".

(a) Equity capital

45. The first type of capital for infrastructure projects is provided in the form of equity investment. Equity capital is obtained in the first place from the members of the project consortium or other individual investors interested in taking stock in the project company. However, such equity capital normally represents only a portion of the total cost of an infrastructure project. In order to obtain commercial loans or to have access to other sources of funds to meet the capital requirements of the project, the members of the project consortium and

other individual investors have to offer priority payment to the lenders and other capital providers, thus accepting that their own investment will only be paid after payment of those other capital providers. Therefore, the members of the project consortium, as the main promoters of the project, typically assume the highest financial risk. At the same time, they will hold the largest share in the project's profit, once the initial investment is paid. Substantial equity investment by the companies participating in the project consortium is typically welcomed by the lenders and the host Government, as it helps reduce the burden of debt service on the project company's cash flow and serves as an assurance of those companies' commitment to the project.

(b) Commercial loans

46. Debt capital often represents the main source of funding for infrastructure projects. It is obtained in the financial market primarily by means of loans extended to the project company by national or foreign commercial banks, typically using funds which originate from short to medium-term deposits remunerated by those banks at floating interest rates. Consequently, loans extended by commercial banks are often subject to floating interest rates and have normally a maturity term shorter than the project period. However, where feasible and economic, given financial market conditions, banks may prefer to raise and lend medium-to-long term funds at fixed rates, so as to avoid exposing themselves and the project company over a long period to interest rate fluctuations, while also obviating the need for hedging operations.

47. Due to the magnitude of the investment required for a privately financed infrastructure project, loans are often organized in the form of "syndicated" loans with one or more banks taking the lead role in negotiating the finance documents on behalf of the other participating financial institutions, mainly commercial banks.

48. Commercial loans are usually provided by the lenders under the condition that their payment takes precedence over the payment of any other of the borrower's liabilities. Therefore, commercial loans are said to be "unsubordinated" or "senior" loans. Senior loans may be divided into "unsecured" and "secured" according to whether their payment is guaranteed by any security provided by the borrower. Unsecured loans (i.e. loans that are not guaranteed by any security offered by the borrower) are typically provided on account of the borrower's creditworthiness. However, with a view to minimizing their exposure, lenders providing unsecured loans often require an undertaking from the borrower that its net assets will not be pledged in the favour of another party in preference to the unsecured creditors (such an undertaking as usually referred to as "negative pledge"). Secured loans, in turn, are typically guaranteed by collaterals provided by the borrower, such as shares of the project company or its property and receivables. The borrower's ability to offer such types of security and the creditworthiness of the borrower and their guarantors typically limit the risk to which the lenders are exposed, thus reducing the cost at which the credit is offered.

(c) "Subordinated" debt

49. The third type of funds typically used in these projects are "subordinated" loans, sometimes also called "mezzanine" capital. These loans rank higher than equity capital in order of payment, but are subordinate to senior loans. This subordination may be general (i.e. ranking generally lower than any senior debt) or specific, in which case the loan agreements specifically identify the type of debt to which it is subordinated. Subordinated loans are often provided at fixed rates, usually higher than those of senior debt. As an additional tool to attract such form of capital, or sometimes as an alternative to higher interest rates, providers of subordinated loans may be offered the prospect of direct participation in capital gains, by means of the issue of preferred or convertible shares or debentures, sometimes providing an option to subscribe for shares of the project company at preferential prices.

50. Subordinated loans may be provided by the project company's shareholders, as a supplement to equity investment or may originate from other sources, such as governmental financial institutions, financing companies, investment funds and other so-called "institutional investors" such as insurance companies, collective investment schemes (e.g. mutual funds) or pension funds. These institutions normally have large sums available for long-term investment and may represent an important source of additional capital for infrastructure projects. Their main reason for accepting the risk of providing capital to infrastructure projects are the prospect of remuneration and the interest in diversifying investment. Normally, institutional investors do not participate otherwise in the development of the project or the operation of the facility.

(d) Capital market funding

51. As more experience is gained with privately financed infrastructure projects, increased use is being made of capital market funding. Funds may be raised at the capital market by the placement of bonds and other negotiable instruments on a recognized stock exchange. Typically, the public offer of negotiable instruments requires regulatory approval and compliance with applicable requirements of the relevant jurisdiction, such as requirements concerning the information to be provided in the prospectus of issuance and, in some jurisdictions, the need for prior registration. Bonds and other negotiable instruments may have no other security than the general credit of the issuer, or may be secured by a mortgage or other lien on specific property.

52. The possibility of gaining access to capital markets is usually greater for existing public utilities with an established commercial record than for companies specially established to build and operate a new infrastructure and lacking the required credit rating. Indeed, a number of stock exchanges require that the issuing company must have some established record over a certain minimum period before being permitted to issue negotiable instruments.

(e) Financing by Islamic financial institutions

53. One additional group of potential capital providers are Islamic financial institutions. Those institutions operate under rules and practices derived from the Islamic legal tradition. One of the most prominent features of banking activities under their rules is the absence of interest payments,

and consequently the establishment of other forms of consideration for the borrowed money, such as profit sharing or direct participation of the financial institutions in the results of the transactions of their clients. As a consequence of their operating methods, Islamic financial institutions may be more inclined to consider direct or indirect equity participation in a project than other commercial banks. At the same time, those financial institutions would give emphasis to reviewing economic and financial assumptions of projects for which financing is sought and would follow closely all phases of its implementation.

(f) Financing by international financial institutions

54. International financial institutions may also play a significant role as providers of loans, guarantees or equity to privately financed infrastructure projects. A number of projects have been co-financed by the World Bank, the International Finance Corporation or by regional development banks.

55. International financial institutions may play an instrumental role also in the formation of "syndications" for the provision of loans to the project. Some of those institutions have special loan programmes under which they become the sole "lender of record" to a project, acting on its own behalf and on behalf of participating banks and assuming the responsibility for processing disbursements by participants and for subsequent collection and distribution of loan payments received from the borrower, either pursuant to specific agreements or other rights that are available under their status of preferred creditor. Some international financial institutions may also provide equity or mezzanine capital, by investing in capital market funds specialized in securities issued by infrastructure operators.

56. International financial institutions may also provide guarantees against a variety of political risks, including, *inter alia*, expropriation or nationalization, failure of the host Government to make agreed payments (where the project company is a supplier of goods or services to a Governmental agency), to make available sufficient foreign exchange or to grant necessary regulatory approvals. The availability of these types of guarantees may facilitate the project company's task of raising funds in the international financial market.

(g) Support by export credit agencies

57. Export credit agencies may provide support to the project in form of loans, guarantees or a combination of both. The participation of export credit agencies may provide a number of advantages, such as: lower interest rate than the rates applied by commercial banks and longer-term loans, sometimes at a fixed interest rate. However, insurance coverage or other form of support by export credit agencies is usually tied to the purchase of equipment originating from their countries or containing a certain minimum percentage of national components.

(h) Combined public and private finance

58. In addition to loans and guarantees extended by commercial banks and national or multilateral public financial institutions, in a number of cases public funds have been combined

with private capital for financing new projects. Such public funds may originate from State income or sovereign borrowing. They may be combined with private funds as initial investment or as long-term payments, or take the form of governmental grants or guarantees (see chapter V, "Government support", ___).

59. Infrastructure projects may be co-sponsored by the Government through equity participation in the project company, thus reducing the amount of equity and debt capital needed from private sources. Land grants may also be made to the project company, so as to provide additional revenue sources (e.g. service areas or shopping malls alongside toll roads). In the case of new infrastructure, the risk to which the private sector is exposed may be mitigated by ancillary concessions for operation of infrastructure already in existence (e.g. a concession over an existing toll bridge may complement a concession for building and operating a new one).

60. In some cases, Governments undertake to make direct payments to the project company with a view to stimulating investment in projects perceived to be of high commercial risk. Private sector investment in new toll roads, for instance, may be discouraged by the fact that traffic forecasts, however professionally they may be prepared, are uncertain and depend on a number of unforeseeable factors. In order to attract investment to new projects deemed to be of public interest, some countries have introduced a system of direct payment by the Government of a flat sum established, for example, on the basis of a traffic estimate. Flat-fee payments may also be used in the case of infrastructure of low commercial potential (e.g. railbed and stations, piped sewerage and treatment).

61. Government support is often justified by the public interest in developing infrastructure which the private sector alone might not be willing to develop without some form of financial support. It is also argued that, even when some form of public financial support is provided, private investment in infrastructure reduces significantly the need for public subsidies and expenditures that would otherwise be incurred without private investment. Therefore, direct Government support is not considered to be inconsistent with the concept of private infrastructure financing. However, some forms of financial support offered by Governments have been criticized as constituting undesirable incentives contrary to the principles of private operation of infrastructure leading to project mismanagement (see chapter V, "Government support", ___).

4. Parties involved in infrastructure projects

62. The parties to a privately financed infrastructure project may vary greatly depending on the infrastructure sector, the modality of private sector participation and the arrangements used for financing the project. The following paragraphs identify the parties in a typical privately financed infrastructure project involving the construction of a new infrastructure facility and carried out under the "project finance" modality.7/

7/ This section discusses selected issues that arise in connection with different phases of a privately financed infrastructure project. For more information, including an analysis of economic, financial and management issues, the reader is advised to consult general literature on the subject, such as the *UNIDO BOT Guidelines*.

(a) The host Government

63. The execution of a privately financed infrastructure project frequently involves a number of public authorities in the host country. The awarding authority and the main body responsible for the project within the host Government may rest at the national, provincial or local level. Furthermore, the execution of the project may necessitate the active participation (e.g. for the issuance of licences or permits) of other agencies in addition to the awarding authority, at the same or at a different level of Government. These authorities (which, as indicated in para. 25, are collectively referred to in the *Guide* as "the host Government") play a crucial role in the execution of privately financed infrastructure projects.

64. The host Government normally identifies the project pursuant to its own policies for infrastructure development in the sector concerned and determines the type of private sector participation that would allow the most efficient operation of the infrastructure. Thereafter, the host Government conducts the process that leads to the selection of the concessionaire. Furthermore, throughout the life of the project, the host Government may need to provide various forms of support - legislative, administrative, regulatory and sometimes financial - so as to ensure that the infrastructure is successfully built and adequately operated. Finally, in some projects the host Government may become the ultimate owner of the facility.

65. The host Government has a legitimate interest in ensuring that the project is properly executed and that the construction work meets the expected standards. Thus, the Government will usually reserve the right to monitor the execution of the project, a task that might involve governmental officials at different offices and ministries, and which requires an adequate level of coordination among them. For that purpose, it may be helpful to appoint an agency, committee or officer invested with the authority to coordinate all monitoring procedures in connection with the project (see chapter I, "General legislative considerations", paras. 22-27).

66. The host Government also has an interest in receiving high quality infrastructure that will benefit the national economy by the provision of needed services. Additionally, the host Government might be interested in creating employment opportunities for local workers, or gaining advanced technology related to the project. Those objectives are sometimes reflected in legislative or contractual provisions concerning technology transfer or margins of preference for companies that undertake to hire local personnel.

67. The host Government remains accountable to the public and will therefore be interested in ensuring that the infrastructure is operated efficiently and in accordance with its overall policy for the sector concerned. Besides evaluating their qualifications, the host Government reviews carefully the composition of project consortia, so as to satisfy itself of their commitment to the project in all its phases (see further chapter III, "Selection of the concessionaire", paras. 36-38). Issues affecting the general public, such as quality and continuity of services, environmental protection, level of tariffs or the observance of health and safety standards, are of particular concern for the host Government. Thus, the host Government may wish to retain the right to exercise some form of control over the operation of the project, sometimes through a special

regulatory body or through the enforcement of the terms of the project agreement (see chapter VII, "Operational phase", ___).

(b) The project company and its shareholders

68. The bulk of the investment in the project, in terms of money, supplies and labour, is made in the construction, expansion or renovation of the infrastructure. Thus, the project consortium usually includes construction and engineering companies and suppliers of heavy equipment interested in becoming the main contractors or suppliers of the project. Those companies will be intensively involved in the development of the project during its initial phase, and their ability to cooperate with each other and to engage other reliable partners will be essential for a timely and successful completion of the works. However, by the very nature of their business, construction companies and equipment suppliers may not be at ease with a long-term equity participation in a project. Therefore, they will often seek to involve a company with experience in the operation and maintenance of the type of infrastructure being built. The presence of one or more of such companies may be encouraged or even required by the host Government as an assurance that the technical feasibility and the financial viability of the project in all its phases, and not only during the construction period, have been adequately considered.

69. For the project company's shareholders it is important to have a return on their investment commensurate with the level of risk they assume. Besides commercial aspects, such as the level of revenue that the project is expected to generate, the legal security afforded to investments in the host country will play an important role in the decisions of those companies to invest in a given project (for a discussion of the need for a favourable legal framework for private investment in infrastructure, see chapter I, "General legislative considerations", paras. 28-62). In particular, they will seek to obtain assurances that their investment will be protected from confiscation or dispossession. Foreign companies will also look for guarantees that they will be able to convert into foreign currency the revenue earned in local currency, and that they will be able to repatriate or take abroad their profits and residual investment after the expiry of the project term (see chapter V, "Government support", ___).

70. The companies participating in the project consortium typically establish a separate company with legal capacity, assets and management of its own for the specific purpose of carrying out the project (see chapter IV, "Conclusion and general terms of the project agreement", paras. 22-34). It is relatively simple to vest all rights, assets and obligations related to the project in a single independent legal entity. Under such a model, the direct involvement of other parties such as the project company's shareholders may be limited, and the project company will enter into the project agreement and other instruments in its own name and will have its own personnel and management. Furthermore, a project company established as an independent legal entity allows a clear separation between the assets, proceeds and liabilities of the project and those of the project company's shareholders, thus facilitating accounting and auditing procedures. The project company normally becomes the vehicle for raising the financial means required in addition to the equity contributed by its shareholders. Typically, the shareholders will choose a type of company in which their liability will be limited by the value of their shares (such as a joint stock company). Sometimes, the shareholders of the project company may also include "independent"

equity investors not otherwise engaged in the project (usually institutional investors, investment banks, bilateral or multilateral lending institutions, sometimes also the host Government or a State-owned corporation). The participation of private sector investors from the host country is sometimes encouraged by the host Government.

71. The project company will have the overall responsibility for the project and will establish a number of contractual arrangements with construction contractors, equipment suppliers, the operation and maintenance company and other contractors, as required for the implementation of the project. Having usually no recourse to the individual shareholders, the host Government may require the project company to provide various types of guarantees for the performance of its obligations under the project agreement (see chapter VIII, "Delays, defects and other failures to perform", ___).

(c) Lenders

72. In traditionally secured transactions, the lenders typically rely on the overall creditworthiness of the borrower and are protected against failure of the project by guarantees provided by the project company's shareholders or their parent companies. This form of financing is usually described as "corporate finance" or "balance-sheet" finance, to emphasize that the amounts borrowed to finance the project become a corporate liability of the project company's shareholders. Corporate finance would typically be provided to borrowers with a sufficiently strong credit to stand the risk of project failure. Insofar as the lenders are protected against that risk, corporate finance may be available to creditworthy borrowers at relatively favourable terms.

73. However, for large-scale projects involving the construction of new infrastructure the shareholders are often not ready to guarantee the obligations of the project company. Therefore, these projects are often carried out as "project finance", where the repayment of loans taken by the borrower is primarily assured by the revenue generated by the project. Other guarantees are either absent or cover only certain limited risks. To that end, the project's assets and revenue, and the rights and obligations relating to the project, are independently estimated and are strictly separated from the assets of the project company's shareholders.

74. Project finance is said to be "non-recourse" financing due to the absence of recourse to the shareholders of the project company. In practice, however, lenders are seldom ready to commit the large amounts needed for infrastructure projects solely on the basis of a project's expected cash flow or assets. The lenders may reduce their exposure by incorporating into the project documents a number of back-up or secondary security arrangements and other means of credit support provided by the project company's shareholders, the host Government, purchasers or other interested third parties. This modality is commonly called "limited recourse" financing.

75. The risks to which the lenders are exposed in project finance, be it non-recourse or limited recourse, are considerably higher than in traditionally secured transactions, even more so in the case of infrastructure projects where the security value of the physical assets involved (e.g. a road, bridge or tunnel) would rarely cover the total financial cost of the project, given the lack of

a "market" where such assets could be easily realized. This circumstance affects not only the terms under which the loans are provided (e.g. the usually higher cost of project finance, as compared to corporate finance), but also the composition of the lending syndicate and the role played by the lenders in structuring the project.

76. Before agreeing to finance the project, the lenders would review carefully the economic and financial assumptions of the project so as to assure themselves of its feasibility and commercial viability. The lenders' attention will typically be focused on assessing the following types of project risks: *pre-completion risks*, i. e. the risk that the infrastructure might not be completed at all, or that it might be completed later than originally planned or at a higher cost than the original estimate; *operating risk*, i. e. the risk that the facility might fail to operate at the expected level of efficiency; and *market risk*, i. e. the risk that the commodity produced or service provided might not be marketable at the price and at the volume originally estimated. Commercial banks that specialize in lending for certain industries are typically not ready to assume risks with which they are not familiar. For example, long-term lenders may not be interested in providing short-term loans to finance infrastructure construction. Therefore, in large-scale projects, different lenders are often involved at different phases of the project.

77. The lenders usually negotiate with the project consortium to structure the project in a way that limits their exposure to those risks to an acceptable level. As for pre-completion risks, for example, the lenders examine carefully the management, specific skills and financial strength of the construction contractor or contractors and typically require that they provide an adequate level of equity investment and an acceptable form of guarantee of performance (see further chapter VI, "Construction phase", ___; and chapter VIII, "Delays, defects and other failures to perform", ___). A similar approach will be taken with regard to operation risks (see further chapter VII, "Operational phase", ___; and chapter VIII, "Delays, defects and other failures to perform", ___). Acceptable protection against market risk will depend on the nature of the commodity produced or service provided. In power generation projects, for example, the lenders might find comfort in the existence of a firm commitment by a power distribution company to a certain minimum level of purchase (e.g. a "take-or-pay" agreement). Where services are provided directly to the public, the lenders will be concerned about the criteria for fixing and adjusting the prices and whether regulatory controls apply (see chapter VII, "Operational phase", ___). They will further review carefully the terms of the concession granted to the project company (whether it is an exclusive concession or and whether the project company will compete with other service suppliers) (for a discussion of issues concerning competition, see chapter II, "Sector structure and regulation", ___; see also chapter IV, "Conclusion and general terms of the project agreement", paras. 17-21).

78. In addition to that, extensive security arrangements are negotiated with the project company and its shareholders with a view to guaranteeing priority payment of commercial debts before payments are made to other creditors or dividends are distributed to equity investors or to the project company's shareholders, and to conferring control of the project on the lenders in the event of default by the project company.

79. Security used in project finance typically includes mortgages, fixed or floating charges over all the assets of the project and assignments of future receivables arising from the operation of the project. Also, the lenders usually require the automatic deposit of an agreed part of those proceeds into a blocked account. Often loan agreements give the lenders the right to appoint a substitute in the event of default or inability of the project company to continue operating the infrastructure. The greater the amount of security the laws of the host country allow to be stipulated, the greater is the likelihood that financing will be available for the project at more favourable terms (see chapter I, "General legislative considerations", paras. 18-19; and chapter IV, "Conclusion and general terms of the project agreement", paras. 39-45).

80. With a view to avoiding disputes that might arise from conflicting actions taken by individual lenders, or disputes between lenders over payment of their loans, lenders extending funds to large projects typically negotiate a so-called "inter-creditor agreement". An inter-creditor agreement usually contains provisions dealing with matters such as provisions for disbursement of payments, pro rata or in a certain order of priority; conditions for declaring events of default and accelerating the maturity of credits; coordination of foreclosure on security provided by the project company.

(d) International financial institutions and export credit agencies

81. International financial institutions and export credit agencies will have concerns of generally the same order as other lenders to the project. In addition to this, they will be particularly interested in ensuring that the project execution and its operation will not be in conflict with particular policy objectives of those institutions and agencies. Increasing emphasis is being given by international financial institutions to the environmental impact of infrastructure projects and their long-term sustainability.

82. The methods and procedures applied to select the concessionaire will also be carefully considered by international financial institutions providing loans to the project. Many global and regional financial institutions and bilateral development funding agencies have established guidelines or other requirements governing procurement with funds provided by them. These institutions and agencies usually require procurement proceedings to be conducted in accordance with their guidelines or requirements, even if national procurement laws differ. This requirement is typically reflected in their standard loan agreements (see further chapter III, "Selection of the concessionaire", para. 17).

(e) Other capital providers

83. Capital providers other than commercial banks and international financial institutions may include "institutional investors" such as insurance companies, mutual funds, pension funds or investment funds. Under the terms of their investment, these other capital providers are usually entitled to priority payment of principal and interest, or priority dividend payment, before dividends are distributed to the project company's shareholders and other shareholders of the project company. They will often have the right to receive periodic reports and financial statements. In the case of institutional investors holding preferential shares or debentures, they will enjoy other rights available to them under the laws of the country where the project company

is established or where the shares or debentures were issued, which may include any of the following: the right to be collectively represented by an agent; the right to be consulted on and to approve certain changes in the statutes of the project company and to be kept informed of them until repaid; a preferential right to distribution of surplus assets.

(f) Construction contractors and suppliers

84. The construction contractor or contractors usually assume responsibility for the design of the facility and caretaking of it through all stages of construction until its physical completion. Their main interest is to be able to complete the works within the agreed schedule and original cost estimate and in conformity with the technical requirements. Typically, the construction contractor will be required to indemnify the other members of the project consortium against losses that arise from that contractor's failure to perform.8/

85. Often one or more of the companies that conclude contracts with the project company for the construction of the infrastructure facility or the supply of equipment are also members of the project consortium. This situation carries with it the risk that equipment suppliers or construction contractors might attempt to secure contracts at preferential terms. This is one reason why some host Governments insist on the right to review or approve the terms of such contracts (see chapter VI, "Construction phase", ___).

(g) Operation and maintenance company

86. The operation and maintenance of the infrastructure may be carried out by the project company itself or may be entrusted to a contractor or group of contractors. Among all private parties to a project, infrastructure operators are the ones with the longest lasting involvement in the project. The operating company in particular will be in a singular position, as the task of operating the facility will place it in direct relation with its customers and will expose the operating company to public scrutiny. For those reasons, the operating company's viewpoint as regards the assessment of the economic and financial viability and profitability of the project may differ from the viewpoint of the other members of the project consortium and, therefore, it may be valuable to obtain the input of the prospective operating company at the early stages of the project, for instance by including the operating company among the project company's shareholders.

87. Where a contractor is retained for the operation and maintenance of the infrastructure, possible methods of payment may vary from lump-sum payments to cost-plus methods, in which the variable portion above and beyond the recovery of costs may be either a fixed sum, a percentage of the cost or a share in the revenue of the project. Combinations of any of those methods are also common. From the perspective of the project company, performance-based contracts are in most cases preferable to cost-plus contracts. The project company will normally

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8/ For a discussion of remedies for, and contractual approaches for dealing with, default by the construction contractor, see *UNCITRAL Construction Legal Guide*, pp. 182-195 and pp. 199-212.

establish some form of control mechanism over the operation of the facility (e.g. audit rights and cost review) so as to ensure that the operating costs are kept as much as possible within original estimates. Where the reimbursement of costs is subject to a maximum ceiling, the interest to reduce cost will be shared with the operating company.

88. The performance by the operation and maintenance company is normally subject to standards of quality that may derive from many different sources, including the law, the project agreement, the operation and maintenance contract or the instructions or guidelines issued by the competent regulatory body. In addition to that, a number of other requirements may be contained in legislation such as labour or environmental law. The operation and maintenance company is usually required to provide guarantees in form of independent (or "on-demand") guarantees, contract or performance bonds or surety bonds, and to purchase and maintain adequate insurance, including casualty insurance, worker's compensation insurance, environmental damage and third party liability insurance.

(h) Insurers

89. Privately financed infrastructure projects involve a variety of risks during both the construction and operational phases of the project which the project company, the host Government, the lenders or the contractors may not be able to absorb. Thus, obtaining adequate insurance against such risks is essential for the viability of a privately financed infrastructure project. Typically, an infrastructure project will involve casualty insurance covering its plant and equipment, third party liability insurance, and worker's compensation insurance. Other possible types of insurance include insurance for business interruption, interruption in cash flows, and cost overrun insurance. Those types of insurance are usually available in the commercial insurance markets, although the availability of commercial insurance may be limited for certain *force majeure* risks (e.g. war, riots, vandalism, earthquakes, hurricanes). The private insurance market is playing an increasing role in the coverage against some types of political risks, such as contract repudiation, failure by a governmental agency to perform its contractual obligations or unfair calls of independent guarantees. In addition to private insurance, guarantees against political risks may be provided by international financial institutions, such as the World Bank, the Multilateral Investment Guarantee Agency (MIGA), the International Finance Corporation, regional development banks or by export credit agencies.

(i) Independent experts and advisers

90. Independent experts and advisers play an important role at various stages of the development of privately financed infrastructure projects. Experienced companies typically supplement their own technical expertise by retaining the services of outside experts and advisers, such as financial experts, outside international counsel or consulting engineers. Independent experts and advisers may also assist the host Government in devising sector-specific strategies for infrastructure development and in formulating an adequate legal and regulatory framework. Furthermore, independent experts and advisers may assist the Government in the preparation of feasibility and other preliminary studies, in the formulation of requests for proposals or standard

contractual terms and specifications, in the evaluation and comparison of proposals or in the negotiation of the project agreement.

91. Merchant and investment banks often act as advisers to project consortia in arranging the finance and in formulating the project to be implemented, an activity which, while essential to project finance, is quite distinct from the financing itself. They may also provide advisory services to Governments in seeking solutions to legal, economic, financial and environmental problems that arise in the preliminary phases of infrastructure projects.

92. In addition to private entities, a number of intergovernmental organizations (e.g. the United Nations Industrial Development Organization, the Regional Economic Commissions of the United Nations) and international financial institutions (e.g. the World Bank, the regional development banks) have special programmes whereby they may either provide this type of technical assistance directly to the host Government or assist the host Government in identifying qualified advisers.

5. Phases of execution

93. Depending on the type of infrastructure, the phases through which a privately financed infrastructure project evolves may include the initial identification of the project and the selection of the concessionaire, the conclusion of the project agreement and related instruments, the execution of the construction or modernization works to the operation of the infrastructure facility and possibly the transfer of the project to the host Government. The following paragraphs describe briefly the various phases of a privately financed infrastructure project involving the construction of a new infrastructure facility and carried out under the "project finance" modality. These phases may not necessarily be present in other types of projects, or may evolve in a different way.

(a) Identification of the project

94. One of the initial steps taken by the host Government in respect of a proposed infrastructure project is to conduct a preliminary assessment of its feasibility, including economic and financial aspects such as expected economic advantages of the project, estimated cost and potential revenue anticipated from the operation of the infrastructure facility. It is also important at this stage to assess the technical feasibility of the project as well as its environmental impact. The preliminary conclusions reached by the host Government at this stage will play a crucial role in conceiving the type of private sector involvement that is sought for the implementation of the project, for instance, whether the infrastructure facility will be owned by the host Government and temporarily operated by the private entity, or whether the facility will be owned and operated by the private entity. The choice of the modality of private sector participation will be significant for a series of legal issues commonly dealt with in the legislation, such as the ownership of the infrastructure facility and related assets and the acquisition of land (see chapter IV, "Conclusion and general terms of the project agreement", paras. 8-12).

95. In projects that involve the transfer to the private sector of a governmentally-owned public utility, the host Government may need to take a number of additional preparatory steps with a view

to enabling its operation as a private company, such as restructuring the company according to commercial principles or abolishing statutory monopolies.

96. Following the identification of the future project, it is for the host Government to establish its relative priority and to assign human and other resources for its implementation. At that point, it is desirable that the host Government review existing statutory or regulatory requirements relating to the operation of infrastructure facilities of the type proposed with a view to identifying the main governmental bodies that have to give approvals, licences or authorizations or which have to be otherwise involved in the project. Depending on the importance and level of authority assigned to the project, the host Government, at that stage, may wish to designate an office or agency for the purpose of coordinating the input of other offices and agencies concerned and monitoring the issuance of licences and approvals (for further consideration of this issue, see below, chapter I, "General legislative considerations", paras. 22-27).

97. Furthermore, the host Government may need to make advance budgeting arrangements, to enable it to meet financial commitments that extend over several budgetary cycles, such as long term commitments to purchase the project's output (e.g. "take-or-pay" arrangements) or other forms of support provided to the project (see chapter V, "Government support", ___).

(b) Selection of the concessionaire

98. Once a project has been identified, its viability and feasibility have been assessed, and the need or interest for private financing has been confirmed, the host Government will turn to the selection of the concessionaire. For projects involving the construction of new infrastructure, the selection method often involves competitive proposals submitted by a selected number of candidates who have met the relevant prequalification requirements.

99. The confidence of project consortia in the viability of the project and their readiness to invest the time and funds required for preparing tenders or proposals is often influenced by their assessment of the rules governing the selection process. Project consortia might be discouraged to participate in a selection process that they perceive as unclear or cumbersome. Therefore, for Governments wishing to attract private sector investment in infrastructure it is advisable to have procedures in place that maximize economy and efficiency in procurement, provide a fair and equitable treatment of all project consortia and ensure transparency in the selection process.

100. Whatever method is chosen by the host Government, the selection process for infrastructure projects is often complex and might require considerable time and entail significant cost for project consortia, thus adding to the overall cost of the project. Ensuring that documents distributed to project consortia are sufficiently clear and contain all elements necessary for the preparation of their tenders or proposals is important to reduce the need for clarifications, as well as minimize the potential for complaints or disputes. The legislation plays a significant role by providing a clear framework for the award of privately financed infrastructure projects. (See further chapter III, "Selection of the concessionaire").

(c) Preparations for the implementation of the project

101. Following the selection of the concessionaire, a number of measures will have to be taken with a view to beginning the implementation of the project. The project agreement will set forth the obligations of the parties concerning the implementation of the project. For projects as complex as infrastructure projects, it is not unusual that several months elapse in negotiations before the parties are ready to sign the project agreement. A number of factors have been reported to cause delay in the negotiations, such as inexperience of the parties, poor coordination between different governmental agencies, uncertainty as to the extent of governmental support, or difficulties in establishing security arrangements acceptable to the lenders.9/ A significant contribution may be made by the host Government by ensuring appropriate coordination among all offices and agencies involved, or by identifying in advance the types of guarantees and facilities it may provide to the implementation of the project (see chapter V, "Government support", ___). The clearer the understanding of the parties as to the matters to be provided in the project agreement, the greater the chances that the negotiation of the project agreement will be conducted successfully. Conversely, where important issues remain open after the selection process and little guidance is provided to the negotiators as to the substance of the project agreement, there might be considerable risk of costly and protracted negotiations.

102. In addition to the conclusion of the project agreement and related instruments, the project company will also enter into agreements with the lenders for the provision of loans for the implementation of the project and will establish contractual arrangements with contractors and suppliers. Moreover, a number of other arrangements are usually made in the period immediately following the award of the project in preparation for the commencement of the construction. The project company may also have at this stage to bring in the country the equipment and other material, as well as the personnel needed for the execution of the project. Where licences are required, the host Government will be instrumental in avoiding unnecessary delays.

(d) Construction phase

103. Following the satisfactory completion of the preliminary arrangements referred to above, funds may be disbursed for the implementation of the project, and the construction works may begin. It is during the construction phase that most of the investment is made in the project, at a time when no revenue is yet generated by the infrastructure. Thus, the overall financial viability of the project is largely predicated upon a successful construction phase. Delays in the construction and cost overruns are the two main reasons of concern for all the parties involved.

104. From the perspective of the host Government, delay and cost overruns also carry negative political implications and may undermine the credibility of the host Government's policy on privately financed infrastructure projects. The host Government usually requires the project

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9/ For a discussion of issues having an impact on achieving financial closure, see International Finance Corporation, *Financing Private Infrastructure*, Washington, D.C., 1996, p. 37.

company to assume full responsibility for the timely completion of the construction. The project company, in turn, will seek relief in the event of *force majeure* and other exempting circumstances, as well as assurances that it will not incur additional cost or liability for delays that result from requests by the host Government for changes in the original design or specifications of the project. Therefore, a number of provisions will be made in the project agreement, sometimes pursuant to a statutory requirement, so as to deal with the possible consequences of those situations (see chapter VIII, "Delays, defects and other failures to perform", ___). Furthermore, the host Government, as well as the lenders, will want to be assured that the technology proposed for the implementation of the project has been sufficiently used and is of proven safety and reliability. They will consider with great caution any suggestion to use new or untested technologies. In any event, a number of tests may be required to be performed prior to final acceptance of the infrastructure facility.

105. Completion and cost-overrun risks will normally be allocated by the project company to the construction contractors and, for that purpose, the construction contract will normally be a fixed-price, fixed-time turnkey contract with guarantees of performance by the contractors. The contract usually requires the construction contractor to provide guarantees that the infrastructure facility will operate to predetermined performance standards. The liability of the construction contractors may extend beyond the completion date pursuant to the terms of their contracts or provisions of the applicable law. Also, the equipment suppliers are usually asked to provide extensive warranties as to the fitness of the technology provided.

(e) Operational phase

106. After completion of the construction works, and upon authorization by the host Government for the operation of the facility, the longest phase of the project begins. During that phase the project company undertakes to operate and maintain the infrastructure facility and to collect revenue from the users. Conditions for the operation and maintenance of the facility, as well as quality and safety standards, are often provided in the law and spelled out in detail in the project agreement. In addition to that, a regulatory body may exercise an oversight function over the operation of the facility (see chapter VII, "Operational phase", ___).

107. For the project company, the revenue generated by the infrastructure facility is the sole source of funds for repaying its debts, recouping its investment and making profit. Therefore, one of the main concerns of the project company during the operational phase is to avoid as much as possible any interruption in the operation of the facility and to protect itself against the consequences of any such interruption. In this respect, the interests of the lenders will normally be convergent with those of the project company. It will be important for the project company to ensure that supplies and power needed for the operation of the facility will be constantly available. Also, the project company will be concerned that the exercise by the host Government of its monitoring or regulatory powers does not cause disturbance or interruption in the operation of the facility, and that it does not result in additional costs to the project company.

108. The host Government, too, will be interested in ensuring the continuous provision of services or goods to the users and customers of the infrastructure facility. At the same time, however, the host Government will have a legitimate interest in ensuring that the operation and

maintenance of the facility are performed in accordance with the applicable quality and safety standards and operating rules and conditions (see chapter VII, "Operational phase", ___). These aspects will be of particular concern to the host Government in respect of infrastructure facilities open to use by the general public (such as a bridge or tunnel) or of a hazardous nature (such as power plants or gas distribution networks). The particular perspective of the host Government, which results from its being accountable to the public for the infrastructure facility, may lead to conflicts or disagreements with the project company. Thus, the importance can be seen of having in place clear rules concerning the operation of the infrastructure facility and of establishing adequate methods for settling disputes between the host Government and the project company that might arise at that phase of the project (see chapter XI, "Settlement of disputes", ___).

(f) End of the project

109. With the exception of those cases where the infrastructure facility is to be permanently owned by the project company, most privately financed infrastructure projects are undertaken for a certain period. In some projects, extensions of the project period in favour of the same project company may be possible; in other cases, the law requires any extension of the concession to be submitted to competitive tendering (a more detailed discussion of these issues is contained in chapter IX, "Duration, extension and early termination of the project agreement", ___). In some countries, it is customary to award consecutive concessions for the same infrastructure, so that the assets are transferred directly from one concessionaire to its successor.

110. Some Governments may, however, have an interest in receiving the infrastructure facility and all related assets and equipment at the end of the term of a BOT project. In those cases, the host Government will be interested in ensuring that modern technology has been transferred, that the infrastructure facility has been properly maintained, and that national personnel have been adequately trained for the operation of the facility.

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PRIVATELY FINANCED INFRASTRUCTURE PROJECTS

Draft chapters of a legislative guide on privately financed infrastructure projects

Report of the Secretary-General

Addendum

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LEGISLATIVE RECOMMENDATIONS

Constitutional issues

(1) It is advisable to review existing constitutional provisions so as to identify possible restrictions to private sector participation in infrastructure development and operation, limitations to the use of public property by private entities and obstacles to private ownership of infrastructure (see paras. 1-4).

Legislative approaches

(2) General enabling legislation may be usefully supplemented by special laws dealing with specific infrastructure sectors. Where sector-specific laws already exist, it is desirable to review them with a view to ascertaining their suitability for privately financed infrastructure projects (see paras. 5-8)

Legislative authority to grant concessions

(3) The law should state clearly the authority of the host Government to award infrastructure projects to the private sector and name those fields of activity or types of infrastructure that may be developed by private entities (see para. 10).

(4) It is advisable for the law to recognize the right of the project company to charge a price for the use of the infrastructure or the service or goods it provides, in accordance with the laws of the country and under the conditions to be provided in the project agreement. It is further advisable for the law to empower the parties to agree on mechanisms for calculating and adjusting those prices (see para. 11).

Legal regime of the project

(5) It may be useful to incorporate into special legislation pertaining to privately financed infrastructure projects those rights and obligations which would otherwise have been applied by implication, and which are found to be appropriate in connection with those projects. The enactment of general enabling legislation may provide an opportunity for excluding the application of those rules of law which are found to pose obstacles to the execution of privately financed infrastructure projects (see paras. 12-15).

Ownership and use of infrastructure

(6) The law should authorize the State to transfer or make available to the project company such public land or existing infrastructure that may be required for the execution of the project (see paras. 16-19).

Legal status of public service providers

(7) It is desirable for the law to authorize the State to grant to the project company the rights, privileges and facilities that are necessary to build and operate the infrastructure and to provide the relevant public services, in its own name or as an agent of the host Government, where the operation of public infrastructure or the provision of public services is reserved to the State (see paras. 20-21).

Administrative coordination

(8) It is advisable for the law to indicate the organs of the host Government, including, as appropriate, national, provincial and local authorities that are authorized to award concessions for infrastructure projects (see paras. 22-23).

(9) The law might entrust one organ with the authority to receive the applications for licences needed for the implementation of infrastructure projects, to transmit them to the appropriate agencies and monitor the issuance of all licences required at the time of the award of the project and other licences that might be introduced thereafter (see paras. 24-26).

(10) The law might also authorize the relevant agencies to issue provisional licences and provide a time period beyond which those licences are deemed to be granted unless they are rejected in writing (see paras. 24-26).

(11) To the extent that the host Government is not in a position to make provisions such as those referred to in (9) and (10) above, it may wish to include in the law a provision requiring the awarding authority to use its best efforts to assist the project company in obtaining the required licences (see para. 27).

Other relevant areas of legislation

(12) In addition to legislation immediately relevant for privately financed infrastructure projects, adequate provisions in other areas of law would facilitate transactions necessary to carry out infrastructure projects and reduce the perceived legal risk of investment in the country (e.g. investment protection law, property law, rules and procedures on expropriation, intellectual property law, security law, company law, accounting practices, contract law, insolvency law, tax law, environmental protection law, settlement of disputes) (see paras. 28-62)

National legislation and international agreements

(13) The host Government may wish to consider the desirability of adhering to international agreements on trade facilitation or agreements on promotion of trade in specific industries and services that would have a positive impact on the implementation of privately financed infrastructure projects (see paras. 63-67).

NOTES ON LEGISLATIVE RECOMMENDATIONS

A. Legal framework for privately financed infrastructure projects

1. Constitutional issues

1. The constitutional law of a number of countries refers generally to the duty of the State to ensure the provision of public services. Some of them list the infrastructure and services sectors which come under the responsibility of the State, while in others the task of identifying those sectors is delegated to the legislator. Under some national constitutions, the provision of certain public services is reserved exclusively to the State or to specially created public entities. Other constitutions, however, authorize the State to award concessions to private entities for the development and operation of infrastructure and the provision of public services. In some countries, there are limitations to the participation of foreigners in certain sectors, or there exist requirements that the State should participate in the capital of the companies providing public services.

2. For countries wishing to promote private investment in infrastructure it is important to review the existing constitutional provisions so as to identify possible restrictions to the implementation of privately financed infrastructure projects. In some countries, privately financed infrastructure projects have been delayed by uncertainties regarding the extent of the State's authority to award them. Sometimes, concerns that those projects might contravene constitutional provisions on State monopolies or on the provision of public services have led to judicial disputes, with negative impact on the implementation of the projects.

3. Another important category of constitutional provisions includes those relating to the ownership of land or infrastructure facilities. The constitutional law of some countries contains limitations concerning private property of land and certain types of means of production. In other countries private property is recognized, but the constitution declares all or certain types of infrastructure to be State property. Prohibitions and restrictions of this nature might be an obstacle to the execution of projects that entail private operation, or private operation and ownership, of the relevant infrastructure.

4. Irrespective of the choice made by the host Government regarding the ownership of infrastructure, it is important for a country wishing to attract private investment in infrastructure to ensure that the State is authorized to make available to the project company such land or existing infrastructure as may be required for the execution of infrastructure projects. In some countries it has been found necessary to amend the constitution so as to provide the State with that authority.

2. General and sector-specific legislation

5. In some countries, as a matter of legislative practice, it has been considered appropriate to adopt specific legislation regulating the execution and operation of one or more individual projects. In other countries with a well-established tradition of awarding concessions to the private sector for the provision of public services, the State is authorized by general legislation to award to the private sector any activity carried out by the public sector which has an economic value that makes such activity capable of being exploited by private entities. General enabling legislation of this type creates a framework for providing a uniform treatment to issues that are common to privately financed projects in different infrastructure sectors. Countries that consider it desirable to adopt general legislation may wish to determine what issues are suitable for being dealt with at this legislative level, and what issues should be left for specific legislation, regulations or for the project agreement.

6. By its very nature, general legislation is normally not suitable to address all the particular requirements of different sectors. In fact, the provision of certain public services is in several countries subject to special legislation governing specific infrastructure sectors (e.g. telecommunications, power generation and distribution, road and railway transportation). One of the arguments in favour of the adoption of sector-specific legislation, even in countries that have adopted general enabling legislation addressing cross-sectoral issues, is that it allows the legislator to take into account the market structure in devising regulatory mechanisms for individual infrastructure sectors.

7. Sector-specific legislation typically sets forth the policy of the Government for the sector concerned, lays down the mechanisms for implementing such policy and provides the general rules for the provision of the relevant services. In many countries, sector-specific legislation was adopted at times when a significant portion, or even the entirety of the national infrastructure constituted State monopolies. Recent national strategies for promoting private sector investment in infrastructure were often based on the results of extensive studies that analysed questions such as the extent of competition that could be introduced in the market as a whole or within specific segments of it, and considered the potential economic costs and expected benefits of abolishing legal monopolies or retaining them in full or in part (see chapter II, "Sector structure and regulation", ___). For countries interested in promoting private sector investment in infrastructure it is advisable to review existing sector-specific legislation so as to ascertain their suitability for privately financed infrastructure projects.

8. Sector-specific legislation may further play an important role in establishing a framework for the regulation of individual infrastructure sectors (see chapter II, "Sector structure and regulation", ___). Legislative guidance is particularly useful in countries at the initial stages of setting up or developing national regulatory capacities. Such guidance is also useful to reassure the lenders and the project consortium that the regulators do not have unlimited discretion in the exercise of their functions, but are bound by the parameters provided by the law. However, it is

generally advisable to avoid rigid or excessively detailed legislation, which in most cases would not be adequate to the long-term nature of privately financed infrastructure projects.

3. Elements for an enabling legislation

9. The implementation of privately financed infrastructure projects may require the enactment of special legislation or regulations authorizing the State to entrust the provision of public services to private entities or decentralized entities wholly or partially owned by the State. Besides being sometimes needed to satisfy national constitutional and other requirements, the enactment of express legislative authorization may be an important measure to foster the confidence of potential private sector investors, national or foreign, in a national policy to promote private sector investment in infrastructure. While it is generally not advisable to attempt to regulate through general legislation specific aspects of the mutual rights and obligations of the project company and the Government, there is a number of core issues that might usefully be addressed in general legislation.

(a) Legislative authority to grant concessions

10. In some legal systems the State is directly responsible for the provision of public services and may not delegate such a function without prior legislative authorization. For those countries that wish to attract private investment in infrastructure, it is therefore particularly important that the law states clearly the authority of the Government to entrust to entities other than governmental agencies the right to provide certain public services and to charge a price for them. For clarity purposes, it is further advisable to identify in such general legislation those fields of activity in which concessions may be awarded.

11. The law should also empower the parties to agree on mechanisms for calculating and adjusting those prices, when they are not established by a regulatory body. Such a general provision in the enabling legislation may be particularly important in those countries where public services are State monopolies, or where it is envisaged to engage private entities to provide certain services that used to be available to the public free of charge. In some countries the absence of prior legislative authorization has given rise to judicial disputes challenging the project company's authority to require the payment of a price for the service provided.

(b) Legal regime of privately financed infrastructure projects

12. In some legal systems belonging to or influenced by the civil law tradition, the provision of public services may be governed by a body of law known as "administrative law", which governs a wide range of State functions. In most of those countries there are well-defined concepts of administrative law that may cover certain forms of infrastructure projects, such as "public works concession", "public services concession", or "delegations", "licences" or "permissions" for the provision of certain forms of public services. Various rights and obligations of the parties may derive from statutory provisions, judicial precedent or general principles of law, according to the

type of the project and the nature of the instrument of award (e.g. whether a bilateral agreement or a unilateral act).

13. In some of those legal systems, for instance, the Government generally has the right to revoke administrative contracts or to modify their scope and terms, for reasons of public interest, usually subject to compensation of loss caused to its contractors, or additional cost incurred by them. Additional rights might include extensive monitoring and inspection rights, as well as the right to impose sanctions on the private operator for failure to perform. In some countries, there are special provisions for the settlement of disputes arising out of Government contracts, and there may be limitations to the right of governmental agencies to agree on non-judicial procedures for settlement of disputes (see chapter XI, "Settlement of disputes", ___). At the same time, some legal systems recognize certain implied conditions in all Government contracts that afford a certain level of protection to Government contractors, such as the right to review the terms of the contract following unforeseen changes in the circumstances (see chapter VIII, "Delays, defects and other failures to perform", ___). In some countries, however, the ability of the Government to revoke or alter the terms under which a private entity provides a public service might be limited to those cases where the relevant instrument was issued in the form of a unilateral act of discretion.

14. The existence of a special legal regime applicable to infrastructure operators and public service providers is not limited to the legal systems referred to above. In several countries belonging to or influenced by the common law tradition there are special rules for each type of public utility (e.g. telecommunications, railways, electricity), which may not always be systematically grouped into a broader body of law. In these countries, too, particular rules have been developed for Government contracts, often through the extensive use of standard forms and terms. Those special rules typically give the Government certain powers of termination or modification balanced by an obligation to indemnify the contractor against the damage sustained by reliance on the contract. In that regard, an important distinction is made in some common law jurisdictions between "franchises", which create vested rights in the public utility to provide the relevant service, from mere "licences", which are personal privileges usually capable of being revoked by the grantor. However, in some countries it is understood that even unilateral acts licensing a private entity to carry out a given activity may create vested rights and, therefore, they may not be changed by the Government without the consent of the private entity, unless such possibility is expressly provided for in the law or in the terms of the licence.

15. In countries where Government contracts are subject to a special regime, it may be advisable for the legislature to review the adequacy of the existing regime for privately financed infrastructure projects and to identify possible difficulties that might result from the application of such a special regime. For purposes of transparency and to avoid any doubts by potential foreign as well as domestic investors, it may be useful to incorporate into special legislation pertaining to privately financed infrastructure projects those rights and obligations that are implied or are not treated systematically in the legal system and which are found to be appropriate in connection with those projects. By the same token, the enactment of general enabling legislation may

provide an opportunity for excluding the application of those rules of law which are found to pose obstacles to the execution of privately financed infrastructure projects.

(c) Ownership and use of infrastructure

16. A number of countries have extensive provisions on the preservation and protection of State property, including special procedures and authorizations required for transferring the title to such property to private entities or granting to private entities the right to use governmental property. Whatever choice is made by the host Government regarding the ownership of the infrastructure facility to be built, modernized or rehabilitated, it is important for a country wishing to attract private investment in infrastructure to authorize the State to transfer or make available to the project company any land or existing infrastructure required for the execution of the project for a period not less than the duration of the project agreement.

17. The ownership regime for a particular project may be the result of practical considerations, such as the operational life of the infrastructure or the interest of the Government in retaining title to it. Moreover, in some projects the parties may wish to distinguish between assets that are to be owned by or reverted to the Government at the end of the concession period, and other assets acquired by the project company during that period and which remain the project company's property. In some countries the law expressly provides that title to all assets originally furnished by the host Government for the construction of the facility, and to the facilities and improvements built thereafter by the project company, is vested in the host Government throughout the duration of the agreement. Some laws, on the other hand, authorize the transfer to the project company of title to the property required for the purposes of the concession or provide that the project company will own all assets that are acquired as a result of the concession. Other laws, while not authorizing the transfer of title to the project company, provide for some other rights *in rem* and provide in detail for their nature and scope (e.g. leasehold, right to use, usufruct).

18. Whatever form its rights may take, for the project company it is important to be assured that they are based on sufficient legislative authority and that it will be able to enforce them against third parties. The same concern will be shared by the lenders and other project investors. Furthermore, in view of the legal restrictions that apply in many countries to the use of public property by private entities, the Government may necessitate prior legislative authorization to allow the project company to use any additional public property.

19. Therefore, it might be desirable for the relevant legislation to clarify the nature of the property rights, if any, that may be granted to the project company, taking into account the type of infrastructure concerned. Furthermore, it might be useful for the law to authorize the Government to grant to the project company the right to use land, roads and other supporting facilities not directly related to the project, as required for the construction and operation of the infrastructure, under the terms and conditions to be provided in the project agreement.

(d) Legal status of public service providers

20. Public agencies or State organs providing public services are typically entrusted with powers designed to facilitate the provision of the service and to ensure that the users comply with and observe the pertinent regulations and rules. This may include, for instance, the right to issue, or control compliance with, safety regulations and the right to suspend the provision of service for emergency or safety reasons or because of default or non-compliance by the users (see chapter VII, "Operational phase", ___). Those powers typically derive from the overall authority of the State and in some legal systems they are inherently governmental.

21. In countries with a well established tradition of awarding concessions for the provision of public services, the concessionaire is typically entrusted with the necessary powers by a delegation of authority from the State. The extent of powers delegated to the concessionaire is usually defined in the project agreement and may not need to be provided in detail in general enabling legislation of the type discussed in the *Guide*. However, where the operation of public infrastructure or the provision of public services is reserved to the State, it is desirable for the law to provide the State with the general authority to grant to the project company the rights, privileges and facilities that are necessary to build and operate the infrastructure and to provide the relevant public services, in its own name or as an agent of the host Government.

4. Administrative coordination

22. Depending on the administrative structure of the host country, privately financed infrastructure projects may require the involvement of several different governmental agencies, at various levels of Government. For instance, the competence to lay down regulations and rules for the activity concerned may rest in whole or in part with a governmental agency at a level different from the one that is responsible for providing the relevant service. It may also be that both the regulatory and the operational functions are combined in one entity, but that the authority to award Government contracts is centralized in a different governmental agency. For projects involving foreign investment, it may also happen that certain specific competences may fall within the mandate of the agency of the host Government that is responsible for approving foreign investment proposals.

23. Where general enabling legislation is adopted, it is advisable to indicate clearly the agencies or levels of government competent to award infrastructure projects to the private sector. It may be useful to consider the extent of powers that may be needed by authorities other than the central Government to carry out projects falling within their purview. General legislation may itself provide the procedures for identifying or prioritizing infrastructure projects to be awarded to the private sector or it may refer to the rules that will establish those procedures. Similarly, the legislation may provide the procedures to be followed for the selection of the concessionaire, or indicate under which rules the selection is to be carried out (see further chapter III, "Selection of the concessionaire").

24. In addition to clarifying matters relating to the overall authority to award projects in a specific sector, the legislation may play a useful role in facilitating the issuance of approvals and licences that may be needed in the course of a project (such as licences under foreign exchange regulations; licences for the incorporation of the project company; authorizations for the employment of foreigners; registration and stamp duties for the use or ownership of land; importation licences for equipment and supplies; construction licences; licences for the installation of cables or pipelines; licences for bringing the facility into operation; spectrum allocation for mobile communication). The required licences and authorizations may fall within the competence of various organs at different levels of the national administration and the time required for their issuance may be significant, particularly when the approving organs or offices were not originally involved in conceiving the project or negotiating its terms.

25. By the time the project agreement is signed, the project consortium will normally have spent considerable time and invested significant sums in the project (e.g. preparation of feasibility studies, engineering design and other technical documents; preparation of tendering documents and participation in the tendering proceedings; negotiation of the project agreement, loan agreements and other project-related contracts agreements; hiring consultants and advisers). The possibility of not obtaining the licences needed for the construction of the facility may dissuade serious investors from competing for the award of the project. Furthermore, delay in bringing an infrastructure project into operation as a result of failing licences is likely to compromise the project's financial viability or cause considerable loss to its sponsors. Where the additional financial cost cannot be recovered by means of an extension of the concession period, or by raising the tariffs or charging higher prices, the project company might turn to the host Government for redress or support. The consequence would often be an increase in the cost of the project and in its cost to the public.

26. An early assessment of licences needed for a particular project may significantly contribute to avoiding delay in the implementation phase. A possible measure to enhance the coordination in the issuance of licences and approvals might be to entrust one organ with the authority to receive the applications for licences, to transmit them to the appropriate agencies and monitor the issuance of all licences listed in the request for proposals and other licences that might be introduced by subsequent regulations. The law may also authorize the relevant agencies to issue provisional licences and provide a time period beyond which those licences are deemed to be granted unless they are rejected in writing.

27. However, there might be instances where the host Government, for constitutional or other reasons pertaining to its internal organization, might not be in a position to assume responsibility for the issuance of all licences or to entrust one single body with such a coordinating function. In that case, the host Government might wish to consider providing some assurance that nevertheless it will as much as possible assist the project company in obtaining licences required by national law, for instance as by designating an office or agency dedicated to provide information and assistance to project consortia regarding the required licences to be obtained, as well as the relevant procedures and conditions.

B. Other relevant areas of legislation

28. In addition to issues pertaining to legislation immediately relevant for privately financed infrastructure projects, a favourable legal framework may include provisions in other areas of legislation. Private investment in infrastructure would be encouraged by the existence of legislation that promotes private investment in economic activities. The following paragraphs point out only a few selected aspects of other fields of law that may have an impact on the implementation of infrastructure projects.1/ The existence of adequate legal provisions in these other fields may facilitate a number of transactions necessary to carry out infrastructure projects and to reduce the perceived legal risk of investment in the country.

1. Investment protection

29. One matter of particular concern for the project consortia and the lenders is the degree of protection afforded to investment in the host country. The confidence of investors in the host country may be fostered, for example, by protection from nationalization or dispossession without judicial review and appropriate compensation. Companies participating in project consortia will also be concerned about their ability, *inter alia*, to bring to the country without unreasonable restrictions the qualified personnel required for working with the project, to import needed goods and equipment, to have access to foreign exchange as needed, transfer abroad or repatriate their profits.

30. For countries that already have adequate investment protection legislation, it may be useful to consider expressly extending the protection provided in such legislation to private investment in infrastructure projects.

31. In addition to adopting domestic legislation on investment protection, an increasing number of countries have entered into bilateral investment agreements which aim at facilitating and protecting the flow of investment between the contracting parties. Investment protection agreements usually contain provisions concerning the admission and treatment of foreign investment; transfer of capital between the contracting parties (e.g. payment of dividends abroad, repatriation of investment); availability of foreign exchange for transfer or repatriation of proceeds of investment; protection from expropriation and nationalization and settlement of investment disputes. The existence of such an agreement between the host country and the originating country or countries of the members of the project consortium may play an important

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1/ For a general overview of the legal framework required for fostering private investment in privatized sectors, see United Nations Conference on Trade and Development (UNCTAD), *Comparative Experiences with Privatization*, New York and Geneva, 1995, pp.40-52. Particularly in respect of economies in transition, see United Nations Economic Commission for Europe, *Legal Aspects of Privatization in Industry*, New York, 1992, pp. 13-30.

role in their decision to invest in the host country. Depending on its terms, such an agreement may reduce the need for assurances or guarantees by the Government geared to individual infrastructure projects.

32. A multilateral agreement on investment is currently being negotiated under the auspices of the Organization for Economic Cooperation and Development (OECD). The OECD multilateral agreement on investment is intended to deal with dispute settlement, protection of investors and investments, liberalization, privatization and monopolies, key personnel, environment and labour issues, performance requirements, investment incentives.

2. Property law

33. It is desirable that the property laws of the host country reflect modern acceptable standards and contain adequate provisions on the ownership and use of land and buildings, as well as moveable and intangible property (e.g. copyrights), and ensure the project company's ability to purchase, sell, transfer and license the use of property, as appropriate.

34. Whether the project company owns the land on which the facility is built, or is only granted a right to use it, it is important that the ownership of the land can be clearly and unequivocally established through adequate registration and publicity procedures. The project company and lenders will need reasonable proof that ownership of the land will not be subject to dispute. They will therefore be reluctant to commit funds to the project if the laws of the host country do not provide adequate means for ascertaining ownership of the land. It is also desirable to ensure that the project company will be able to create security interest on such property, for the purpose of obtaining financing for the project (see chapter IV, "Conclusion and general terms of the project agreement", paras. 39-45).

35. It is further necessary to provide effective mechanisms for the enforcement of the property and possessory rights granted to the project company against violation by third parties. Enforcement should also extend to easements and rights of way that may be needed by the project company for providing and maintaining the relevant service (e.g. placing of poles and cables on private property to ensure the distribution of electricity) (see chapter IV, "Conclusion and general terms of the project agreement", paras. 13-16).

3. Rules and procedures on expropriation

36. Usually the host Government assumes the responsibility for providing the land required for the implementation of the project, which may be either purchased from its owners, or, if necessary, acquired through expropriation (see chapter IV, "Conclusion and general terms of the project agreement", paras. 8-12). Many countries have legislation governing expropriation procedures and that legislation would apply to any expropriation required for privately financed infrastructure projects.

37. Expropriation procedures are usually lengthy and complex. They may also involve a number of offices at different ministries or levels of Government. Particular delay may be encountered in some countries where the expropriation takes the form of court proceedings. The host Government might thus wish to review existing provisions on expropriation for reasons of public interest with a view to assessing their adequacy to the needs of large infrastructure projects and to determining whether such provisions allow quick and cost-effective procedures, with due consideration to the rights of the owners. It is particularly important to enable the host Government to take possession of the property as early as possible, so as to avoid start-up delay and increased project costs (see chapter VIII, "Delays, defects and other failures to perform", ___).

4. Intellectual property law

38. Privately financed infrastructure projects frequently involve the use of new or advanced technologies protected under patents or similar intellectual property rights. They may also involve the formulation and submission of original or innovative solutions, which may constitute the proponent's proprietary information under copyright protection. Private investors, national and foreign, bringing new or advanced technology into the country or developing original solutions, will need to be assured that their intellectual property rights will be protected and that they will be able to enforce those rights against infringements.

39. A legal framework for the protection of intellectual property may be provided by adherence to international agreements regarding the protection and registration of property rights. *[The Commission may wish to consider whether a list of the main international instruments and a brief description of their contents, which could be prepared in consultation with the World Intellectual Property Organization (WIPO), should be inserted in this paragraph.]*

5. Security law

40. The type and extent of security offered by the project company or its shareholders will play a central role in the contractual arrangements for the financing of infrastructure projects. The security arrangements may be complex and consist of a variety of forms of security, including fixed security over physical assets of the project company (e.g. mortgages or charges), pledges of shares of the project company and assignment of receivables of the project. While the loan agreements are usually subject to party autonomy as to the law applicable to them, the laws of the host country will in most cases determine the type of security that can be enforced against assets located in the country and the remedies available. Differences in the type of security or limitations in the remedies available under the laws of the host country may be a cause of considerable practical difficulties. It is therefore important to ensure that domestic laws provide adequate legal protection to secured creditors and do not hinder the ability of the parties to establish appropriate security arrangements.

41. Basic legal protection may include provisions ensuring that fixed security (e.g. a mortgage) is a registrable interest and that, once such security is registered in the central register of title or other public register, any purchaser of the property to which the security attaches should take the property subject to such security. Furthermore, security should be enforceable against third parties, have the nature of a property right and not a mere obligation and should entitle the person receiving security to a sale, in enforcement proceedings, of the assets taken as security. Secured creditors should enjoy preference to unsecured creditors in insolvency proceedings.

42. Another important aspect concerns the flexibility given to the parties to define the debt or debts which are secured and the assets which are given as security. In some legal systems, broad freedom is given to the parties in the definition of assets that may be given as security. In some legal systems, it is possible to create security that covers all the assets of an enterprise, making it possible to sell the enterprise as a going concern, which may enable an enterprise in financial difficulties to be rescued while increasing the recovery of the secured creditor. Other legal systems, however, allow only the creation of security that attaches to specific assets and do not recognize security covering the entirety of the debtor's assets. There may also be limitations on the debtor's ability to trade in goods given as security. The existence of limitations and restrictions of this type makes it difficult or even impossible for the debtor to create security over generically described assets or over assets traded in the ordinary course of its business.

43. Given the long-term nature of privately financed infrastructure projects, the parties may wish to be able to define both the debt or debts which are secured and the assets which are given as security specifically or generally. They may further wish such security to cover present or future assets and assets which might change during the life of the security. It may be desirable to review existing provisions on security interests with a view to including provisions enabling the parties to agree on suitable security arrangements.

44. Another form of security typically given in connection with certain privately financed infrastructure projects is an assignment to lenders of proceeds from contracts with customers of the project company. Those proceeds may consist of the proceeds of a single contract (e.g. a power purchase commitment by a power distribution entity) or of a large number of individual transactions (e.g. monthly payment of gas or water bills). In most cases it would not be practical for the project company to specify individually the receivables being assigned to the creditors. Therefore, assignment of receivables in project finance typically takes the form of a bulk assignment of future receivables. However, there may be considerable uncertainty in various legal systems with regard to the validity of the wholesale assignment of receivables and of future receivables.

45. Thus far, no comprehensive uniform regime or model for the development of domestic security laws has been elaborated by international intergovernmental bodies. A model for the development of modern legislation on security interests is offered in the Model Law on Secured Transactions, which was prepared by the European Bank for Reconstruction and Development

(EBRD) to assist legislative reform efforts in central and eastern European countries.2/ Besides general provisions on who can create and who can receive a security right, and general rules concerning the secured debts and the charged property, the EBRD Model Law on Secured Transactions covers other matters, such as the creation of security rights, the interests of third parties, enforcement of security and registration proceedings. The solutions proposed in the EBRD Model Law on Secured Transactions are intended to achieve the objectives discussed in paragraphs 41-44 above. *[A description of the work done by UNCITRAL in the field of assignment of receivables might be inserted in this paragraph, at the appropriate stage.]*

6. Company law

46. In most projects involving the development of a new infrastructure, the members of the project consortium will establish the project company as a separate legal entity in the host country (see chapter IV, "Conclusion and general terms of the project agreement", paras. ___). It is therefore important for the host Government to have adequate company laws with modern provisions on essential matters such as establishment procedures, corporate governance, issuance of shares and their sale or transfer, accounting and financial statements and protection of minority shareholders.

47. The project company's shareholders are interested in limiting their liability to the value of their shares in the company's capital. If it is intended that the project company will offer shares to the public, limited liability will be necessary, as the prospective investors will usually only purchase those shares for their investment value and will not be closely involved in the operation of the project company. It is therefore important that the laws of the host country provide adequately for the limitation of liability of shareholders. Furthermore, adequate provisions governing the issuance of bonds, debentures or other securities by commercial companies will enable the project company to obtain funds from investors on the security market, thus facilitating the financing of certain infrastructure projects.

48. Modern company laws often contain specific provisions regulating the conduct of managers so as to prevent conflicts of interest. Provisions of this type require that managers act in good faith in the best interest of the company and do not use their position to foster their own or other person's financial interests to the detriment of the company. Provisions intended to curb conflicts of interests in corporate management may be particularly relevant in connection with infrastructure projects, where the project company may wish to engage its own shareholders, at one or the other stage of the project, to perform works or provide services in connection therewith (see chapter VI, "Construction phase", ___).

2/ European Bank for Reconstruction and Development, *Model Law on Secured Transactions*, London, 1994.

49. It is important for the law to regulate adequately the decision-making process both for meetings of the shareholders and meetings of management organs of the company (e.g. board of directors or supervisory board). Protection of shareholders' rights and in particular protection for minority shareholders from abuse by controlling or majority shareholders are important elements of modern company laws. It is useful to recognize the right of the shareholders to regulate a number of additional matters concerning the management of the project company through agreements among themselves.

7. Accounting practices

50. The adoption of standard accounting practices is a measure taken in many countries so as to achieve uniformity in the valuation of businesses. The use of modern and internationally acceptable accounting practices may be instrumental for ensuring the marketability of bonds and other security issued by the project company for the purpose of raising funds in international financial markets. In connection with the selection of the concessionaire, the use of standard accounting practices may also facilitate the task of evaluating and comparing proposals and establishing which proposal offers best value for money over the entire concession period (see chapter III, "Selection of the concessionaire", paras. 75-77). Standard accounting practices are further essential for carrying out audits of the profits of companies, which may be required for the application of tariff structures and the verification of compliance by the regulatory body (see chapter VII, "Operational phase", ___).

8. Contract law

51. It is important that the domestic law on commercial contracts provide adequate solutions to the needs of the project company and the lenders, including flexibility in devising contracts as needed for the construction and operation of the infrastructure facility. Besides some essential elements of adequate contract law, such as general recognition of party autonomy, judicial enforceability of contract obligations and adequate remedies for breach of contract, the laws of the host country may create a favourable environment for privately financed infrastructure projects by facilitating contractual arrangements likely to be used in these projects.

52. Where a new infrastructure is to be built, the project company may need to import large quantities of supplies and equipment. Greater legal certainty for those transactions may be facilitated if the laws of the host country contain provisions specially adapted to international sales contracts. A particularly suitable legal framework may be provided by adherence to the United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980) or other international instruments dealing with specific contracts, such as the UNIDROIT Convention on International Financial Leasing (Ottawa, 1988).

9. Insolvency law

53. The insolvency of an infrastructure operator or public service provider raises a number of issues that have led some countries to establish special rules to deal with those situations,

including rules that enable the host Government to take the measures required to ensure the continuity of the project (see chapter IX, "Duration extension and early termination of the project agreement", ___). Of particular concern for the secured lenders will be provisions concerning secured claims, particularly as to whether secured creditors may foreclose on the security despite the opening of insolvency proceedings, whether secured creditors are given priority for payments made with the proceeds of the security and how claims of secured creditors are ranked.

54. The insolvency of a project company is likely to involve creditors from more than one country or affect assets located in more than one country. It may therefore be desirable for the host country to have provisions in place that facilitate judicial cooperation, court access for foreign insolvency administrators and recognition of foreign insolvency proceedings. A suitable model that may be used by States wishing to adopt legislation for that purpose is provided in the UNCITRAL Model Law on Cross-Border Insolvency.3/

10. Tax law

55. The general taxation regime of the host country plays a significant role in the investment decisions of private companies. Beyond an assessment of the impact of taxation in the project cost and the expected margin of profit, private investors consider questions such as the overall transparency of the domestic taxation system, the degree of discretion exercised by taxation authorities, the clarity of guidelines and instructions issued to taxpayers, the objectivity of criteria used to calculate tax liabilities.

56. Some countries, particularly developing countries and economies in transition, have made use of tax incentives to attract foreign investment or to promote investment in specific industries or regions. Common types of tax incentives may include reduced corporate income tax, exemption from income tax for foreign personnel required to staff the project, exemption from real estate tax, and tax concession on royalties or import duties. It should be noted, however, that project-specific tax incentives in the form of waivers or reductions of particular taxes, special tax withholding or deduction schemes or other ad hoc deviations from the general taxation regime of the host country are potentially discriminatory and may be less transparent than more direct forms of governmental support to the project (see chapter V, "Government support", paras. ___). Furthermore, it may be advisable for national Governments to review extensive tax incentives to foreign enterprises, particularly those which are indefinite and awarded to all kinds of foreign investment, since their continuation might put domestic investors at an unfair competitive disadvantage.

3/ The text of the Model Law was adopted by the Commission at its thirtieth session (Vienna, 12-30 May 1997) and is set forth in annex I to the report of UNCITRAL on the work of its thirtieth session (*Official Records of the General Assembly, Fifty-second Session, Supplement No. 17* (A/52/17)).

57. One particular problem of privately financed infrastructure projects involving foreign investment is the possibility that foreign companies participating in a project consortium might be exposed to double taxation, i.e. taxation of profits, royalties and interests in their own home countries as well as in the host country. A number of countries have entered into bilateral agreements to eliminate or at least reduce the negative effects of double taxation, and the existence of such agreements between the host country and the home countries of the consortium members often plays a role in their tax considerations.

11. Environmental protection

58. Environmental protection laws are likely to have a direct impact on the implementation of infrastructure projects at various levels. Environmental protection laws often require prior authorization for the exercise of a number of business activities, which may be particularly stringent for some types of infrastructure (e.g. waste water treatment, waste collection). Authorizations and licences are often required for undertaking construction works or for installing certain physical structures. The denial of an environmental licence may in some cases constitute an impediment to the execution of the whole project.

59. Therefore, it is advisable to ensure the highest possible degree of clarity in provisions concerning the tests that may be applied by the environmental authorities, the documentary and other requirements to be met by the applicants, the conditions under which licences are to be issued, the circumstances that justify the denial or withdrawal of a licence and the appeals procedures and judicial remedies, as appropriate, that are available to the applicants. It may be further advisable to ascertain to the extent possible, prior to the final award of the project, whether the conditions for obtaining such a licence are met (see paras. 22-27). In some countries, special governmental agencies or advocacy groups may have a right to institute legal proceedings to seek to prevent environmental damage, which may include the right to seek the withdrawal of a licence deemed to be inconsistent with applicable environmental standards. In some of those countries it was found useful to involve representatives of the public in the proceedings that lead to the issuance of environmental licences.

60. Further issues under the host country's environmental laws may arise when the project company takes over an existing infrastructure facility, in particular where the question of responsibility for environmental damage caused by State-owned industry prior to privatization has not been clarified. Private investors may be reluctant to take over an existing infrastructure or purchase shares in public utilities which may be called upon in the future to compensate for or remedy environmental damage caused by the enterprise before it was privatized. It may therefore be advisable to establish mechanisms for compensating the private investors for liability incurred as a result of environmental damage caused during the period of State operation.

12. Settlement of disputes

61. Another important factor for the implementation of privately-financed infrastructure projects is the legal framework in the host country for the settlement of disputes (see chapter XI, "Settlements of disputes", __). Investors, contractors and lenders may be encouraged to participate in projects in countries that provide a hospitable and internationally acceptable legal climate for the settlement of disputes, as offered by the UNCITRAL Model Law on International Commercial Arbitration. The efficiency of the national judicial system, the expeditiousness of court proceedings and the availability of forms of judicial relief that are adequate to commercial disputes are additional factors to be taken into account. Of particular importance is the possibility of recognition and enforcement of foreign arbitral awards, which will be fostered by adherence to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958).

62. A framework for the settlement of disputes between the host Government and foreign companies participating in a project consortium (see chapter XI, "Settlement of disputes", ___) may be provided by adherence to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (Washington, 1965). The Convention, which has thus far been adhered to by 139 States, established the International Centre for the Settlement of Investment Disputes (ICSID). ICSID provides facilities for the conciliation and arbitration of disputes between member countries and investors who qualify as nationals of other member countries. Recourse to ICSID conciliation and arbitration is voluntary. However, once the parties to a contract or dispute have consented to arbitration under the ICSID Convention, neither can unilaterally withdraw its consent. All ICSID members, whether or not parties to the dispute, are required by the Convention to recognize and enforce ICSID arbitral awards. ICSID is an autonomous international organization with close links with the World Bank.

C. National legislation and international agreements

63. In addition to the internal legislation of the host country, privately financed infrastructure projects may be affected by international agreements entered into by the host country. The implications of certain international agreements is briefly discussed below.

1. General agreements on trade facilitation and promotion

64. A number of multilateral agreements have been negotiated to promote free trade at the global level. The most notable of those agreements have been negotiated under the auspices of the General Agreement on Tariffs and Trade (GATT), and later the World Trade Organization (WTO). Those agreements may contain general provisions on trade promotion and facilitation of trade in goods (e.g. a most-favoured nation clause, prohibition of the use of quantitative restrictions and other discriminatory trade barriers) and on the promotion of fair trade practices (e.g. prohibition of dumping and limitations on the use of subsidies). Some specific agreements are aimed at the removal of barriers for the provision of services by foreigners in the contracting

States or promoting transparency and eliminating discrimination of suppliers in public procurement. Those agreements may be relevant for national legislation on privately financed infrastructure projects which contemplates restrictions on the participation of foreign companies in infrastructure projects, or establishes preferences for national entities, or for the procurement of supplies in the local market.

2. International agreements on specific industries

65. The telecommunications sector to date is governed by specific international commitments on matters of market structure, competition and regulation. In the context of the negotiations on basic telecommunications concluded as part of the General Agreement on Trade in Services (GATS), a number of World Trade Organization (WTO) member States representing most of the world market for telecommunication services have made specific commitments to facilitate trade in telecommunication services. Other WTO member countries may still file specific commitments, those that already made them may offer improvements at any time, whereas new WTO members may be asked as part of the adhesion negotiations to include specific telecommunications commitments.

66. It should be noted that all WTO member States (even those that have not made specific telecommunications commitments) are bound by the general GATS rules on services, including specific requirements dealing with most-favoured-nation treatment, transparency, regulation, monopolies and business practices. The WTO telecommunications agreement adds sector-and country-specific commitments to the overall GATS agreement. Typical commitments cover the opening of various segments of the market, including voice telephony, data transmission and enhanced services, to competition and foreign investment. Legislators of current or prospective WTO member States would thus ensure that the country's telecommunications laws are consistent with the GATS agreement and their specific telecommunications commitments.

67. Another important sector-specific agreement at the international level is the Energy Charter Treaty, concluded at Lisbon on 17 December 1994 and in force since 16 April 1998, which has been enacted to promote long-term cooperation in the energy field. The Treaty provides various commercial measures like the development of open and competitive markets for energy materials and products, the facilitation of transit and the access to and transfer of energy technology. Furthermore, the Treaty aims at avoiding market distortions and barriers to economic activity in the energy sector and promotes the opening of capital markets to encourage the flow of capital in order to finance trade in economic materials and products. The treaty also contains regulations about investment promotion and protection: equitable conditions for investors, monetary transfers related to investments, compensation for losses owing to war, civil disturbance or other similar events, and compensation for expropriation.

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